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No. 21754

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21754

UNITED STATES OF AMERICA, Appellant

v.

EDISON R. NOGUEIRA, ET AL., Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES, APPELLANT

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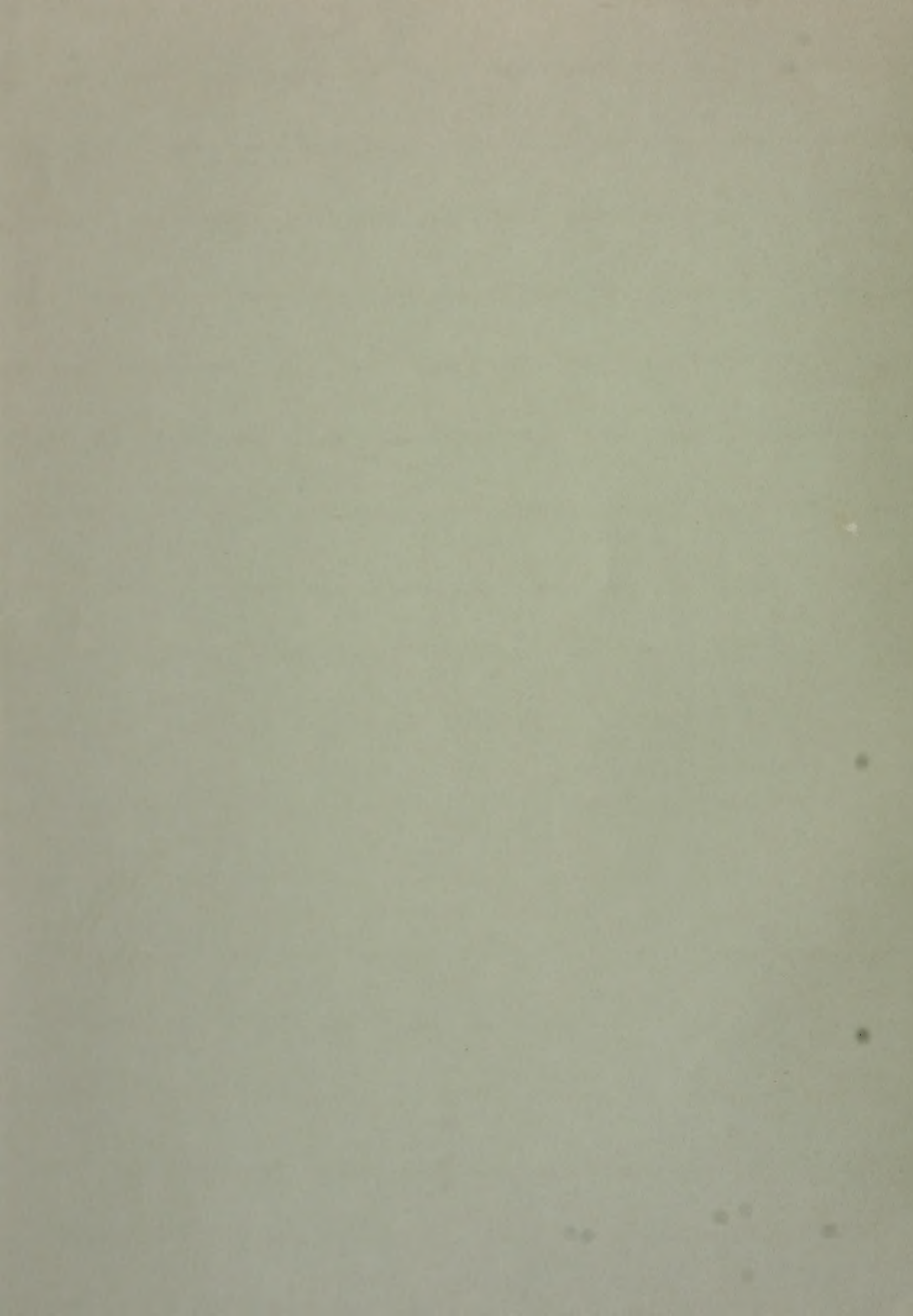
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FILED

OCT 13 1967

OCT 18 1967



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BRIEF FOR THE UNITED STATES, APPELLANT

OPINION BELOW

The court's memorandum relating to certain motions (R. 52-53) is not reported, nor are its conclusions of law stating the reasons for its action (R. 153).

JURISDICTION

The district court had jurisdiction of this suit for ejectment and other relief instituted by the United States, under 28 U.S.C. sec. 1345. The judgment of the district court dismissing the case was filed on November 16, 1966 (R. 157-158). Notice of appeal was filed on January 9, 1967 (R. 160-161). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

QUESTION PRESENTED

Whether the district court lacked jurisdiction of a suit to eject defendants from property of the United States and to recover trespass damages because of the assertion of a mining claim, an earlier mining claim to the same property having been rejected by the Department of the Interior, especially when the facts indicated that the claim was not located or continued for a bona fide purpose of developing a profitable mine and the defendants were, by their own admissions, using the property for purposes other than mining.

STATUTES INVOLVED

Section 3 of the Act of May 10, 1872, 17 Stat. 91,

30 U.S.C. sec. 26, provides in part:

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, * * *.

Section 4(a) of the Act of July 25, 1955, 69 Stat.

368, 30 U.S.C. sec. 612, provides:

Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.

STATEMENT

This is an appeal from a dismissal, without trial, of a complaint seeking to eject defendants and to recover damages because of trespass upon land and occupation of a residence in the Cleveland National Forest. The dismissal was on the ground that the validity of a mining claim under which defendants claimed rights must first be adjudicated by the Department of the Interior. The facts, as they appear from the pleadings, depositions and affidavits in connection with a motion for summary judgment, may be summarized as follows:

The Grape Vine Placer Mining Claim was located in 1903 and 1945 on lands now within the Cleveland National Forest. An application for a patent, filed by Mary A. Matthey, widow (after 1946) of the original locator, was rejected after Interior Department proceedings by opinion dated February 29, 1960. The

ground was that the material involved, shale used for the manufacture of sewer pipe, is a common clay not subject to location under the mining laws (R. 88-93).

Mrs. Matthey lived with her son, Robert, for many years prior to 1966.^{1/} During this time, Robert, who worked for Walt Disney motion pictures in 1966, lived in West Los Angeles and Sunland, California (R. Dep. 3). He said that in 1960, after the Interior Department decision, the family had a "lot of investment" in this claim and that he "had to do something or just quit" (R. Dep. 23). As a consequence, on May 1, 1961, Mary executed a quitclaim deed to Robert of the lot known as the Grape Vine Placer Mining Claim (R. 75). Under date of May 8, 1961, Robert leased to Maria Nogueira "that certain unpatented mining claim," with an option to the lessee to purchase on 30 days' notice (R. 70-73). On May 18, 1961, there was filed by Robert for recording a placer location, purportedly of fire clay, located on May 1, with date of discovery May 6, the location notice being verified May 10 (R. 69). Robert said

^{1/} Many of the facts stated appear from the depositions of Robert A. Matthey ("R. Dep."), Edison Nogueira ("E. Dep.") and Maria Nogueira ("M. Dep."), which were considered in connection with the motion for summary judgment and copies of which have been filed with the Clerk.

he had known for years and years where the fire clay was and that in 1961 he removed seven or eight cubic feet of material, and later removed a few tons (R. Dep. 14-15). He also said the \$200 work on the location notice included his labor (R. 53-54).

Except for such minor excavations, there has been no mining from the property since at least 1960. Instead, the Nogueiras have used the land as a residence. Edison Nogueira retired as consul for the Brazilian government after having worked in that occupation for some 25 years in various parts of the world (E. Dep. 5, 13). He is not at the claim much of the year, spending time traveling in the public relations business (E. Dep. 13-14). His wife stays at the claim when he is away (E. Dep. 14-16). Before coming to the property, he lived in Riverside, California, and found Robert Matthey through a real estate saleswoman (E. Dep. 21-24, 25-26). He said his daughter, Maria Nogueira, had her first citizenship papers and she took the lease because he could not qualify (E. Dep. 24-25).

Maria Nogueira, who was born in Brazil and who had last worked in 1961, kept house with her mother (M. Dep. 3, 6-7). She said she met Matthey because "We was looking for a

place to live close to the Corona Area" (M. Dep. 11). She agreed there had been no mining since 1961 (M. Dep. 33).

By letter of October 30, 1962, the Forest Service requested removal by January 30, 1963 (Ex. 1 to M. Dep.). Under date of December 18, 1963, Maria filed an application for five acres of the Grape Vine Mining Claim under the Act of October 23, 1962 (Ex. 2 to M. Dep.). That application stated that the claim had been originally located in 1903, again in 1945, "lastly on May 10, 1961 by Robert A. Matthey"; that major improvements were completed in 1949-1951 and "[m]ajor remodeling and some additions to the residence were completed in 1961, 1962"; that the mining claim "was determined to be invalid on February 29, 1960"; and that "The said claim was the permanent home of Mary A. Matthey's husband and the father of Robert A. Matthey and it was the vacation home of Robert A. Matthey. It was on October 23, 1962 the permanent home of the claimant herein." This application was rejected on the ground that it failed to qualify under the 1962 statute. Under date of March 16, 1964, Robert Matthey executed a quit-claim deed to Maria of "The GRAPEVINE Placer Mining Claim located May 1st, 1961" (R. 74).

The Nogueiras having refused to move, this suit was instituted by complaint filed February 2, 1965 (R. 1-4). An answer was filed and also a counterclaim, which alleged that defendants "have maintained and occupied the premises as their permanent home and residence since May 8, 1961," and the defendants were entitled to relief under the 1962 Act (R. 11-15). The United States moved to strike the counterclaim for lack of consent to suit (R. 20) and, besides opposing, defendants moved to amend their answer by asserting a fourth affirmative defense seeking judicial review of the decision rejecting the original Grape Vine Claim (R. 20-33).

After hearing, the district court, on February 21, 1966, filed a memorandum stating that the case was not ripe for action by the court because the Department had not held the 1961 claim to be invalid and that such an adjudication was "a preliminary prerequisite to jurisdiction by any court on the validity of a mining claim [which] was settled in Best, et al. v. Humboldt Placer Mining Co., et al., 1963, 371 U.S. 334." Accordingly, the court suggested that defendants move for summary judgment of dismissal (R. 52-53). The defendants moved for summary judgment (R. 56-75). The United

States opposed (R. 77-97). An order was entered March 21, 1966, that depositions should be taken and that they should be considered in connection with the motion (R. 110-111). After additional briefing, the court entered findings of fact that since May 1961 defendants have been in possession of the Grape Vine Mining Claim, which was located by Robert Matthey on May 1, 1961; that no proceedings have been instituted since May 1961 to contest the claim; and that the alleged valuable mineral was an uncommon variety of fire clay (R. 152-153). The court concluded (1) that it has no jurisdiction to determine the right of defendants to occupy the claim until final administrative decision after hearing under the Administrative Procedure Act and (2) that, until the mining claim is finally adjudicated as invalid, defendants are in lawful possession "and are entitled to be free from obstruction, resistance and interference by the United States, its agents, officers and employees" (R. 153). This appeal followed from the judgment which dismissed the complaint and also the answer and counter-claim and motion to amend the answer (R. 157-161).

SPECIFICATION OF ERRORS

The district court erred:

1. In dismissing the action.
2. In granting defendants' motion for summary

judgment.

3. In finding that defendants are in possession of the Grape Vine Placer Mining Claim.

4. In finding that such claim was located on May 1, 1961.

5. In concluding that the court has no jurisdiction to determine the right of the defendants to occupy the Grape Vine Placer Mining Claim.

6. In concluding that, until said claim is finally adjudicated to be invalid, defendants are lawfully in possession and occupation of the Grape Vine Placer Mining Claim.

7. In denying all relief to the United States.

SUMMARY OF ARGUMENT

The holding that the district court lacked jurisdiction of this case because the Department of the Interior had not adjudicated the 1961 mining claim to be invalid was plainly erroneous for three independent reasons.

A. This Court, in Kennedy v. United States, 119 F.2d 564 (1941), sustained the right of the United States to secure an adjudication of its right to possession of public domain and, in that connection, to adjudge a stock-raising homestead entry to be invalid, and the same result has been reached in mining claims cases. Best v. Humboldt Mining Co., 371 U.S. 334 (1963), does not hold otherwise. It merely concludes that the institution of condemnation proceedings did not preclude the Department of the Interior from exercising its normal jurisdiction. To preclude court action in the present case could, without just cause, permit the use of repeated mining claims to delay indefinitely continued illegal possession of federal property. Also, it would require separate treatment by the courts and by the Department of different aspects of the same single transaction.

B. A mining claim not filed and occupied for the bona fide purpose and intention of developing a profitable mine is void and, consequently, no defense to a trespass action. The facts of this case clearly demonstrate that the continued occupation by defendants is of this nature and,

hence, is no defense to this action. Congress has recently taken action to enforce a policy of preventing abuse of the mining laws by use of claims for other than mining purposes.

C. Even if the 1961 mining claim were valid, it would justify occupation of the public land only for mining purposes. Congress has specifically so provided in the 1955 statute. Occupation for a permanent residence is clearly illegal and relief prohibiting continuation of such illegal action and damages for past trespasses cannot properly be denied.

ARGUMENT

THE MERE ASSERTION OF RIGHTS
UNDER THE PURPORTED 1961 MINING
LOCATION DID NOT BAR THE UNITED
STATES FROM SECURING JUDICIAL
RELIEF AGAINST ILLEGAL
OCCUPATION OF ITS LANDS

There can, of course, be no question as to the jurisdiction of a federal court over a suit brought by the United States. And no question is raised here as to jurisdiction over the persons of the defendants. Moreover, since defendants' answer and counterclaim were dismissed, this appeal is not concerned with the alleged rights asserted by defendants in their

answer and counterclaim based on the 1962 statute.^{2/} Nor is any issue here presented as to the attempted attack by the Fourth Affirmative Defense on the Interior Department decision of 1960 holding the original Matthey claim to be invalid. For purposes of this appeal, that decision must be treated as conclusive. The court, of course, does not have authority to refuse to grant the United States injunctive relief or damages if trespass upon the public lands is shown. United States v. Langendorf, 322 F.2d 25 (C.A. 9, 1963); United States v. Hosteen Tse-Kesi, 191 F.2d 518 (C.A. 10, 1951). The sole question is, thus, whether the mere assertion of the 1961 mining claim precludes the United States from securing any judicial relief without first following the administrative process of contest, hearings and appeals. We submit that such remedy is not exclusive, especially on the facts of this case.

^{2/} That assertion is contradictory to the theory that the Grape Vine Mining Claim is valid, because it only applies when the Secretary has declared a mining claim to be invalid or where an occupant relinquishes all rights he may have under the claim.

A. The existence of a purported mining claim does not preclude resort by the United States to the courts to secure possession of its property. - In Kennedy v. United States, 119 F.2d 564 (C.A. 9, 1941), the defendant was enjoined from grazing livestock on land in Arizona. He claimed to have made an entry under the stock-raising homestead laws. On appeal, he attacked the trial court's jurisdiction on the ground that "the issue of the case lies solely within the jurisdiction of the Land Department of the Federal Government * * *" (p. 565). This Court rejected the argument and affirmed the judgment, saying (p. 565):

The Government considered Kennedy as a mere trespasser, and appellant sought unsuccessfully to establish that he was more than a trespasser because of some right as a settlor upon the lands, the subject matter of the action. We think Judge Bourquin put the matter well and as succinctly as we could do it in the case of United States v. Schultz, D.C. Cal. 1929, 31 F.2d 764: "The courts are always open to private litigants to determine possessory rights in public land. Gauthier v. Morrison, 232 U.S. [452] 461, 34 S.Ct. 384, 58 L.Ed. 680. Not to determine title, however, because they have not title. But the United States having title, the tribunals are always open to it to vindicate its rights therein, either that of the Land Department or that of the courts, at its election if proceedings are initiated by it. See United States v. Sherman [8 Cir.] 288 F. 497."

The Schultz case, which, like this one, sought an injunction against occupation of national forest lands where the defendant relied upon mining locations, further stated (p. 764): "In general, the courts are open to the United States, and no statute closes them to it in matters of public land other than transfer of title." The same result was reached in United States v. Toole, 224 F.Supp. 440 (D. Mont. 1963).

Best v. Humboldt Mining Co., 371 U.S. 334 (1963), does not overrule the Kennedy line of cases. It simply held that the institution of condemnation proceedings did not preclude the Department of the Interior from exercising its normal authority to adjudicate the validity of mining claims. We recognize this as the appropriate general practice. But Best does not say that the United States is thereby precluded from submitting the question to the courts in cases where such action is deemed appropriate.^{3/} It simply holds (371 U.S. at p. 340): "The United States is not foreclosed from insisting

^{3/} The Kennedy and Schultz cases were called to the attention of the Supreme Court in the petitioner's brief in Best, with the explanation: "There are cases where in a suit to quiet title by the United States or to eject trespassers from public lands, the courts have, as part of the general issue, determined whether there has been a valid mineral discovery [citations]. We have found no case where such a determination has been made by a court at the request of a claimant and over the objection of the United States."

on resort to the administrative proceedings for a determination of the validity of those claims."

The Court does not indicate in Best that the United States is foreclosed from seeking relief in the courts without an administrative determination. The consequences of such a restrictive interpretation of the Best opinion argue against that result. The administrative process of contest, hearings and appeals necessarily is time-consuming. Best emphasizes, in footnote 8, the large volume of work that must be processed by a limited number of hearing examiners. Thereafter, review by the district courts, followed by appeals, is available.^{4/}

A purported location and discovery can be made with a minimum expenditure of money, time and effort, as in this case. Because of the delays incident to the administrative proceedings and court review thereof, such a view would open the door to use of such process to continue illegal possession of the public domain for years. Because of the almost unlimited number

^{4/} The claimant has a choice of the district court where a defendant resides (i.e., the District of Columbia, the residence of the Secretary of the Interior), where the plaintiff resides, or where the property is situated. 28 U.S.C. sec. 1391(e).

of claims that could be asserted under the term "minerals," it would be difficult for the administrative rejections ever to catch up with the claims asserted. The 1961 assertion that "fire clay" is something different and a new discovery, as compared to the original Matthey claim, well illustrates the possibilities.^{5/}

The reading of Best as a limitation would also require separate treatment of different issues which arise out of the same events and depend upon substantially the same evidence. In Point B, infra, we show that a purported mining discovery, where the location is not made and occupation continued for a bona fide purpose of mineral development is void

5/ In opposing the motion for summary judgment, the United States filed the statement of Emmett B. Ball, Jr., Zone Mining Engineer, that (R. 121):

On March 25, 1966 I, Emmett B. Ball Jr. did talk to Maria Nogueira at her residence concerning a red clay find. Miss Nogueira pointed out to me the area of red clay occurrence. This red material was observed by me and found to be of no consequence as the material is less than one foot thick and is exposed over a very few square feet. Even though the red material occurred in large quantities, its uses would be for common red brick and the like.

There appears to have been no mining activity on the Grape Vine Placer claim since my first visit to the claim September 11, 1962.

and could not constitute a defense to this action for possession. In Point C, infra, we show that, even assuming the 1961 mining location to be valid, defendants were not thereby authorized to occupy the property simply for personal residence purposes. These aspects of the basic controversy will necessarily have to be adjudicated by the court. It would be duplication of effort and wasteful to preclude the court in such circumstances from adjudicating the entire matter.

B. The 1961 purported discovery is no defense to this action if it was not a bona fide location made for the purpose of mineral development. Bagg v. New Jersey Loan Company, 88 Ariz. 182, 354 P.2d 40 (1960), recently declared (354 P.2d at p. 45):

It is axiomatic that a locator must act in good faith. * * *

No citation of authority is required to support the statement that the all-pervading purpose of the mining laws is to further the speedy and orderly development of the mineral resources of our country. Consequently, title to mineral lands cannot be acquired by occupancy unless for the prime purpose of mining or extracting minerals. Burns v. Clark, 133 Cal. 634, 66 P. 12; Tit. 30 U.S.C.A. § 22. We therefore hold that an attempted location for any other purpose than that thus specified, is wholly void.

United States v. Ickes, 98 F.2d 271 (C.A. D.C. 1938) cert. den., 305 U.S. 619, declared (at p. 279) that the general policy of mining laws of the United States "has been to promote widespread development of mineral deposits and to afford mining opportunities to as many persons as possible." The Act of July 25, 1955, 69 Stat. 368, 30 U.S.C. sec. 612, expressed the policy to confine use of mining claims to mining purposes and was directed at abuses which had grown up in the use of such claims for other than mining purposes. One of the abuses specifically referred to was the acquisition of mining claims for "residence and summer camp purposes." H. Rept. No. 730, 84th Cong., 1st sess. (1955), p. 6; S. Rept. No. 544, 84th Cong., 1st sess. (1955). At the hearings, speaking for the American Mining Congress, Mr. Raymond B. Holbrook stated (Hearings, S. Comm. on Interior and Insular Affairs on S. 1713 84th Cong., 1st sess. (1955), p. 16):

That organization and its membership have been very much concerned about the problem of mining locations which have been attempted for a purpose other than the recovery of minerals. The purpose may be an attempt to control the timber on the land, or a choice site for a summer cabin, or an area which may have nuisance value. Such locations fall into two categories:

(1) Clearly invalid mining locations, unsupported by any semblance of discovery, and

(2) Mining locations having mineral disclosures which might satisfy the basic requirement of discovery, but which were in fact made for a purpose other than mining.

I think it is generally known that the mining industry has never condoned the making of such locations and, on the contrary, has urged the use of available procedure to defeat them.

Representative Clair Engle stated (101 Cong. Rec. 8743, 84th Cong., 1st sess. (1955)): ^{6/}

There have been recurring instances of abuse of these mining laws in recent years due to the filing of mining claims for the purpose of establishing fishing camps and recreational resorts of various types on public-domain land, and there has been a growing and continuing conflict in the use of the surface of the public-land areas between the mine claimants, the livestock people, those interested in recreation, fish and wildlife, and the lumber handlers.

As a consequence of all of that, it has become increasingly apparent to us that it would be necessary to enact legislation eliminating the filing of phony mining claims which are a real abuse of the mining laws and which the mining industry gives no support whatever.

^{6/} This congressional purpose was even more clearly spelled out in connection with the Act of October 23, 1962, Pub. L. 87-851. See, e.g., 108 Cong. Rec. 19646-19647, 87th Cong., 1st sess. (1962).

In the present case, the locator, Robert Matthey, has admitted that the purported location was not for the purpose of exploring for and developing the mineral (supra, p. 4). It is equally clear that the Nogueiras entered upon and continued to occupy the premises simply for personal residence purposes and not for mining development at all. This is precisely the kind of misuse of the mining laws condemned by Congress and by the courts, supra.

C. The United States is entitled to prohibition of further occupation of the land for other than mining purposes and for damages for past trespass, even if the 1961 mining claim is valid. - While the right of a mining claimant under a valid discovery has been said to be that of exclusive possession, such possession can be maintained against the United States only for mining purposes. In United States v. Rizzinelli, 182 Fed. 675 (D. Idaho 1910), Judge Dietrich spelled out in detail (pp. 680-684) the reasons why the right of the locator to "the exclusive right of possession and enjoyment" under R.S. 2322, 30 U.S.C. sec. 26, "is limited to uses incident to mining operations * * *," following Teller v. United States, 113 Fed. 273 (C.A. 8, 1901). Consequently,

Rizzinelli sustained convictions for maintaining saloons on mining claims in a national forest in violation of regulations of the Secretary of Agriculture, and Teller sustained a criminal conviction for cutting timber on a mining claim for purposes of sale. In Teller, the court said (113 Fed. at p. 281) that the mining claim "did not divest the legal title of the United States, or impair its right to protect the land and its product, by either civil or criminal proceedings, from trespass or waste." These principles were followed more recently in United States v. Etcheverry, 230 F.2d 192, 195 (C.A. 10, 1956), saying: "We construe these cases to hold that the exclusive possession of the surface of the land to which the locator is entitled is limited to use for mining purposes."

Because of the widespread abuses, Congress expressly provided in the Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. sec. 612, that mining claims thereafter located should not be used for other than mining purposes, and a procedure was established for federal management of the surface subject to the miner's rights. Thus, both decisions for many decades and specific declarations of Congress show that the court's second conclusion of law (R. 153) is plainly wrong. By their own

insistence that the land is their permanent residence, as well as their admission that they have never conducted any mining activities on the premises, the Nogueiras have admitted that they illegally occupy the premises. There is no warrant for refusing ejectment and damage for such trespass. ^{7/} In this aspect, the alleged necessity for administrative adjudication of the validity of the 1961 mining claim has nothing to do with the case and cannot justify dismissal of the complaint.

CONCLUSION

It is submitted that the judgment of dismissal should be reversed with directions to order ejectment of the defendants and the award of trespass damages.

Respectfully,

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OCTOBER 1967

7/ The mining law (R.S. 910), 30 U.S.C. sec. 53, specifically provides that the fact of paramount title in the United States does not effect court jurisdiction over possessory actions as to mining claims. Moreover, the Department of the Interior has neither powers nor enforcement means of possessory action.

CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROGER P. MARQUIS
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N O. 2 1 7 5 4
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APPELLEES' REPLY BRIEF

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JAN 2 1968

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N O. 2 1 7 5 4
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

EDISON R. NOGUEIRA, et al. ,

Appellees

APPELLEES' REPLY BRIEF

OPINION BELOW

Neither the court's written Memorandum (R. 52-53) nor the Findings of Fact and Conclusions of Law (R. 152-154) and Judgment (R. 157-158) have been reported.

JURISDICTION

For reasons which appear in the Argument, infra, Appellees maintain that there was no jurisdiction in the District Court to entertain this suit. The District Court agreed with the position and dismissed the action on November 16, 1966 (R. 157-158). Notice of Appeal was filed on January 9, 1967 (R. 160-161). The jurisdiction of this Court to review the ruling below rests on

QUESTIONS PRESENTED

Whether the District Court correctly dismissed the suit for ejectment and damages against the Claimants of an unpatented placer mining claim located upon lands of the United States open to location, when the validity of the mining claim had not been contested in the administrative proceedings before the Department of Interior, and

Whether the dismissal can be supported as a proper exercise of discretion, even though the District Court had jurisdiction.

STATUTES INVOLVED:

Section 22 of 30 U. S. C.

"Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. (R. S. §2319; Feb. 25, 1920,

ch. 85, § 1, 41 Stat. 437.)"

Section 26 of 30 U. S. C.

"The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth.

Section 28 of 30 U. S. C.

"The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims made

after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than \$100 worth of labor shall be performed or improvements made during each year. . . . and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. "

[Emphasis added]

Section 35 of 30 U. S. C.

"Claims usually called "placers" including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the

public lands. "

Section 611 of 30 U. S. C. (Act of July 23, 1955)

"No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" as used in sections 601, 603, and 611-615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. "Petrified wood" as used in sections 601, 603, and 611-615 of this title means agatized, opalized, petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter. July 23, 1955, c. 375, § 3, 69 Stat. 368, amended Sept. 28, 1962, Pub. L. 87-713, § 1, 76 Stat. 652." [Emphasis in original]

Section 612(a) of 30 U. S. C. (Act of July 23, 1955)

"(a) Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonable incident thereto."

Section 485 of 5 U. S. C. provides in part:

"The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:

* * *

4. Bureau of Land Management.

* * *

13. Public lands, including mines."

Section 2 of 43 U. S. C. (Rev. Stat. 453) provides:

"The Secretary of the Interior or such officer as he may designate shall perform all executive duties appertaining to the surveying and sale of the public lands of the United States or in anywise respecting such public lands, and, also such as relate to claims of land, and the issuing of patents for all grants of land under the authority of the Government."

Section 1201 of 43 U.S.C. (Rev. Stat. 2478) provides:

"The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for."

43 C.F.R. §§ 3400.1, 3400.2 and 3401.1 (formerly §§ 185.1 through 185.3:

"(a) Vacant public surveyed or unsurveyed lands are open to prospecting, and upon discovery of mineral, to location and purchase. The act of June 4, 1897 (30 Stat. 36), provides that 'any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry,' notwithstanding the reservation. This makes mineral lands in the forest reserves in the public land states, subject to location and entry under the general mining laws in the usual manner. Lands entered or patented under the stockraising homestead law (title to minerals and the use of the surface necessary for mining purposes can be acquired), lands entered under other agricultural laws but not perfected, where prospecting can be done

peaceably are open to location."

§3400.2 "Whatever is recognized as a mineral by the standard authorities, whether metallic or other substance, when found in public lands in quantity and quality sufficient to render the lands valuable on account thereof, is treated as coming within the purview of the mining laws. Deposits of oil, gas, coal, potassium, sodium, phosphate, oil shale, native asphalt, solid and semisolid bitumen, and bituminous rock including oil-impregnated rock or sands from which oil is recoverable only by special treatment after the deposit is mined or quarried, the deposits of sulphur in Louisiana and New Mexico belonging to the United States can be acquired under the mineral leasing laws (see §3100.0-2), and are not subject to location and purchase under the United States mining laws. The so-called 'common variety' mineral materials and petrified wood on the public lands may be acquired under the Materials Act, as amended (see Part 3610)."

§3401.1 "Rights to mineral lands, owned by the United States, are initiated by prospecting for minerals thereon, and, upon the discovery of mineral, by locating the lands upon which such discovery has been made. A location is made by staking the corners of the claim, posting notice of location thereon and complying with the State laws, regarding the recording of the location

in the county recorder's office, discovery work, etc. As supplemental to the United States mining laws there are State statutes relative to location, manner of recording of mining claims, etc., in the State, which should also be observed in the location of mining claims. Information as to State laws can be obtained locally or from State officials."

43 C. F. R. §1852. 2-1 (Formerly 221. 67)

"The Government may initiate contests for any cause affecting the legality or validity of any entry or settlement or mining claim."

STATEMENT

Appellant appeals from the granting of Defendants' Motion for Summary Judgment of Dismissal.

The court found that Defendants were, since May 19, 1961, in possession of the Grapevine Placer Mining Claim which was located on May 1, 1961 (by relocation) and that MARIA A. F. NOGUEIRA was the owner thereof, subject to the paramount title of the United States of America; that no proceedings had been instituted in the Bureau of Land Management of the Department of Interior to contest the Grapevine Placer Mining Claim or to otherwise attack its validity; that when the mining claim was located it was part of the public domain, and open to mineral entry

(R-152). The court concluded that it had no jurisdiction to determine the right of Defendants to occupy the Grapevine Placer Mining Claim unless and until the validity of the mining claim had been finally determined by the Department of Interior after hearing duly held in accordance with the provisions of the Administrative Procedure Act (R. 153).

The United States of America had instituted the action for ejectment and damages by a complaint which alleged that the Defendants-Appellees were the successors in interest of the Grapevine Placer Mining Claim which was relocated on May 1, 1961 by Robert A. Matthey, their predecessor in interest (R. 3). The Complaint further alleges that the Grapevine Placer Mining Claim is invalid for lack of discovery of a valuable mineral. Defendants-Appellees' Answer set forth that the Grape Vine Placer Mining Claim was declared null and void for lack of discovery of a valuable mineral deposit by the Deputy Solicitor of the Department of Interior on February 29, 1960 at a time when the mining claim was owned by Mary A. Matthey; that the same superficial area was relocated on May 1, 1961 as the Grapevine Placer Mining Claim (R. 9). The Second Affirmative Defense and Counterclaim for Injunction alleges that there has been no contest or other proceeding taken by the United States of America to adjudicate the validity of the Grapevine Placer Mining Claim; that Appellees were entitled to an administrative hearing before they could be deprived of their rights to occupy their unpatented mining claim and that until such administrative adjudication of invalidity, they were entitled to protection against the threats and harrassments of the Secretary

of Agriculture, the Secretary of Interior and their officers, servants, agents and subalterns (R. 13-14). Appellant moved to strike Appellees' counterclaims (R. 20). Appellees thereupon made a motion for leave to amend their answer to include a Fourth Affirmative Defense and Counterclaim seeking judicial review of the final decision in U. S. A. v. Mary A. Matthey, 67 I. D. 63, declaring the Grape Vine Placer Claim null and void on the ground that the decision nullifying the mining claim was subject to judicial review under the Administrative Procedure Act (R. 24).

Both sides presented points and authorities, and arguments in support of their respective positions which gave rise to the court's following written Memorandum (R. 52):

"The matter under submission is the motion of the plaintiff United States of America to strike Defendants' counterclaim and plaintiff's objection to proposed amendment to defendants' counterclaim.

"From an examination of the face of the Complaint it appears that the matter is not yet ripe for any action by this Court, either that sought by the plaintiff or that sought by the defendants.

"The Complaint alleges that a mining claim was located on the property involved on May 1, 1961. There is no allegation that the invalidity of that mining claim has ever been heard or determined by the Bureau of Land Management of the Department of the

Interior. That this is a preliminary prerequisite to jurisdiction by any court on the validity of a mining claim was settled in Best, et al., v. Humboldt Placer Mining Co., et al. 1963, 371 U.S. 334. The appropriate proceeding would appear to be a motion by the defendants for summary judgment of dismissal, either supported by affidavits or other affirmative data showing the act of locating the mine, the date, the fact that the property has not been withdrawn from mineral entry, and the fact that no hearing has ever been called or held in the Department of Interior to determine the validity of said claim, and such other affirmative facts as defendants may deem appropriate.

"These facts are gleaned from the record by virtue of copies of correspondence from the Interior Department, but in view of the provisions of F. R. C. P. 56(e) it would be more appropriate if such affidavits were filed."

On May 4, 1966, Appellees moved the court to enter a summary judgment dismissing the complaint in ejectment on the ground that the court had no jurisdiction of such an action based upon occupancy or possession of an unpatented mining claim, the validity of which had not been yet determined by the Bureau of Land Management of the Department of Interior, relying on the Best et al., v. Humboldt Placer Mining Co., 371 U.S. 334 and

Cameron v. U.S.A. , 252 U.S. 450 (R. 56-58). The affidavit presented in support of the motion for summary judgment showed that the local officials of the Land Office and the Forest Service took the position that since the Grape Vine Placer Mining Claim had been declared null and void the subsequently relocated Grapevine Placer Mining Claim was also null and void and that occupancy of the unpatented mining claim by Appellees constituted a trespass (R. 62). Appellees advised the Land Office and the Forest Service that if they desired to have the validity of the Grapevine Placer Mining Claim adjudicated, the Department of Agriculture should request the Department of Interior to institute appropriate contest proceedings rather than to attempt the eviction of Appellees from the mine by unfounded charges of trespass (R.63).

Selective extraction of excerpts from the depositions, gives the erroneous impression that the Appellees were occupying the Grapevine Placer Mining Claim exclusively for residential purposes and not for any purpose connected with the prospecting for and developing of the mineral deposits located on the said mining claim. When read as a whole, the depositions of Robert A. Matthey, and of Miss and Mr. Nogueira, after giving due weight to the language barrier, indicates the following facts:

The original Grape Vine Placer Mining Claim was located by the father of Robert A. Matthey and was inherited by his mother, Mary A. Matthey. Mrs. Matthey filed an application for patent which was protested by the Forest Service. Hearings were held on

the protest before a Hearing Examiner who dismissed the protest. (See Appendix I). The Decision of the Hearing Examiner was affirmed by the Director of the Bureau of Land Management (See Appendix II), but reversed by the Deputy Solicitor of the Department of Interior (R. 88-93).

Robert A. Matthey relocated the mining claim on May 1, 1961 under 30 U. S. C. 28 by filing Notices of Location and doing the necessary discovery work on fire clay (R. Dep. 14). On the same day, Mary Matthey quitclaimed to Robert Matthey all her right, title and interest in the old Grape Vine Placer Mining Claim which had been declared null and void by the Deputy Solicitor of the Department of Interior on the ground that the sedimentary shale upon which the application for mineral patent had been based, was a "common variety" of material which was not subject to mineral location.

Shortly thereafter vandals were doing extensive damage to the buildings, the well, and the tanks and Matthey sought a caretaker to dwell on the premises (R. Dep. 7, 21 and 39). Appellees contacted Mr. Matthey who told them about the problems with the validity of the mining claim. Appellees agreed to lease the claim with option to buy (R. Dep. 9). Thousands of tons of clay had been mined from this property and it was a going mine until the edict of the Secretary of Interior that the mineral was "common clay" (R. Dep. 13). After the relocation of May 1, 1961, some material was removed for test purposes (R. Dep. 15).

The mine was not operated because of the obstacles put up

by the Forest Service. As Mr. Matthey succinctly stated, "How can you operate a mine at all if your own Government tells you, you can't do it and to get off the premises? He [Nogueira] is fighting for the privilege of developing his claim" (R. Dep. 49).

Appellees moved upon the mining claim, repaired the premises, made efforts to exploit the fire clay on the mining claim. Some of the companies who sampled the clay and with whom Appellees negotiated were American Cement Corp. (E. Dep. 8), Riverside Cement Co. (E. Dep. 9), Gladding McBean and Pacific Clay Corp. (E. Dep. 9 to 11). Almost each week some prospecting efforts were made (E. Dep. 12). Mr. Nogueira had spent many years developing limestone deposits in Brazil for cement purposes (E. Dep. 15) and working with engineers and laboratories while he was in the Brazilian diplomatic service (E. Dep. 38).

Mr. Nogueira started negotiations in March of 1962 with Mr. Nichols of the Ceramics Division of International Pipe and Ceramics Corp. (R. 122-123). Mr. Nichols was instructed in September of 1962 to tell Mr. Nogueira to stop bothering the people at the Corona facilities, as his claim was so hopelessly entangled that Interpace did not wish to proceed any further (R. 123). ('Interpace' is the successor to Gladding-McBean).

The decision of the Hearing Examiner in the California Contest No. 6796 entitled "United States of America v. Mary A. Matthey" contains the following language regarding fire clay:

" . . . The minerals referred to as having been found on the claim were sedimentary clay or

shale, and residual clay or fire clay.

"The contestee witnesses stated that while the shale was the primary material found on the claim, residual clay had been found several months before the hearing. The limited testimony regarding this latter substance was insufficient to base a conclusion that there had been a discovery of residual clay in the quality and quantity necessary to satisfy the mining laws. Therefore, no further consideration was given to this material."

See copy of the Decision set forth in the Appendix to this Brief.

In his 1961 location, Mr. Matthey was merely attempting to develop the fire clay which he already knew existed and Appellees carried on the efforts to develop the discovery of fire clay (R. Dep. 46 through 49).

The correspondence with the Manager of the Land Office (R. 62-63) and the deposition of Mr. Nogueira demonstrates that he did all the prospecting and exploitation of his mining claim that the Department of Agriculture and Department of Interior would permit him to do in the face of their strenuous opposition.

ARGUMENT

I

UNTIL A PATENT HAS BEEN ISSUED, THE
DEPARTMENT OF INTERIOR HAS THE EX-
CLUSIVE JURISDICTION TO DETERMINE THE
VALIDITY OF AN UNPATENTED PLACER
MINING CLAIM.

This question was settled by Best v. Humboldt Placer Mining Co. et al., 371 U. S. 334; 9 L. Ed. 2d 350, 83 S. Ct. 379,^{1/} where the United States sued in the District Court to condemn real property whereon the defendants had unpatented mining claims. The complaint asked that the United States be allowed to reserve authority to have the validity of the mining claims determined in administrative proceedings before the Bureau of Land Management of the Department of the Interior. Thereafter, the United States instituted a contest proceeding in the local Land Office of the Bureau of Land Management, seeking administrative determination of the validity of Defendants' mining claims, alleging that the land was nonmineral in character and minerals had not been found within the limits of the claims in sufficient quantities to constitute a valid discovery. Defendants instituted an action against the State Supervisor of Bureau of Land Management and the Manager of the District Land Office to enjoin them from proceeding with the administrative contest action. The District Court granted a summary judgment of dismissal of the action for injunction. 185 F. Supp.

^{1/} Because of the frequency of reference, the citation will be hereafter omitted.

29. The Court of Appeals reversed (293 F. 2d 553).

Mr. Justice Douglas enunciated the principles applicable to mining claims and the jurisdiction and power of the Secretary of the Interior with respect thereto, stating that: " . . . the Court of Appeals wrote nothing in derogation of these principles in Best v. Humboldt. This expostulation of the principles and authorities supporting them, follows very closely the argument in the brief of the Government in Best v. Humboldt, contending that Congress has given to the Department of Interior primary authority for the administration and disposition of public lands, including mining claims on such lands. Thus, the same quotations from Cameron v. United States, 252 U.S. 450 at 459-462; 40 S.Ct. 410; 64 L.Ed. 659 are found in the opinion. The following excerpts from the Government's brief in Best v. Humboldt, are apposite:

"The Court has thus held that the Department of the Interior has exclusive jurisdiction to determine rights in the public lands so long as no patent has been issued and legal title remains in the United States. See also, Northern Pacific Ry. Co. v. McComas, 250 U.S. 387, 392; Brown v. Hitchcock, 173 U.S. 473, 477. According to these cases, the courts are not to touch the issue of title as between the United States and a private claimant or between private claimants until proceedings before the Department of the Interior have been brought and finally determined. In Brown v.

Hitchcock, supra, a private claimant sued in the federal court for cancellation of an order of the Secretary of the Interior which declared certain lands claimed by the plaintiff from the State of Oregon to be part of the public domain. The Court sustained a demurrer to the complaint and held that, as no patent had been issued, legal title had not passed and that 'so long as the legal title remains in the Government all questions of right should be solved by appeal to the land department and not to the courts' (id. at 477). [Emphasis added]

"The Court had taken the same position in holding that the courts are without jurisdiction to enjoin or mandamus an officer of the Land Department in order to control his exercise of judgment and discretion in determining the validity of claim to public lands (Riverside Oil Co. v. Hitchcock, supra, at 324):

'Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands.'

"Where a patent has been issued, the Court has held that it is to be given conclusive effect by the courts

in a subsequent title dispute (Steel v. Smelting Co.,
106 U.S. 447, 451):

'In Johnson v. Towsley, the effect of the action of that department was the subject of special consideration. And the court applied the general doctrine, "that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others," and said, speaking by Mr. Justice Miller, "that the action of the land-office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated, and in all courts, and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of the court, or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained."
13 Wall. 72, 83.'

"The statutes, regulations issued pursuant thereto, and the judicial precedents announced by this Court over more than a century leave no doubt, then, that the only tribunal which was open to respondents to establish their rights

against the United States was the Department of the Interior.⁸ The cases establish the further proposition that until legal title has passed -- with the issuance of a patent -- the validity of any claim is to be determined by the Department of the Interior in exercise of its primary jurisdiction. In holding that, although no patents for the lands had been issued, the filing of the condemnation action transferred exclusive primary jurisdiction to the district court to determine the validity of the claims, we believe the Court of Appeals was disregarding the statutes and the historic teaching of this Court's long settled decisions."

[Emphasis added]

8 There are cases where in a suit to quiet title by the United States or to eject trespassers from public lands, the courts have, as part of the general issue, determined whether there has been a valid mineral discovery. Kennedy v. United States, 119 F.2d 564 (C. A. 9); United States v. Mobley, 45 F.Supp. 407 (S. D. Cal.); United States v. Schultz, 31 F.2d 764 (N. D. Cal.). We have found no case where such a determination has been made by a court at the request of a claimant and over the objection of the United States.

We adopt these arguments and citations. The applicability of Best v. Humboldt to the case at bench, seems crystal clear, when Justice Douglas states:

"If a patent has not issued, controversy over the claim should be solved by appeal to the Land Department and not to the Court. Brown v. Hitchcock,

173 U.S. 473, 447; 43 L.Ed. 772, 774 and 19 S.Ct. 485, and Northern P. R. Co. v. McComas, 250 U.S. 387, 392; 60 L.Ed. 1053 and 39 S.Ct. 546."

The District Judge in the case at bench dismissed the action for ejectment and damages since the complaint revealed that appellees were occupants of the unpatented Grapevine Placer Mining Claim. The affidavits, the pleadings and the Motion for Summary Judgment as well as antecedent motions, clearly showed that the basic issue involved in the ejectment and trespass action was the validity of the Grapevine Placer Mining Claim which was relocated by Appellees' predecessor in title on May 1, 1961. The complaint expressly alleges that the mining claim is invalid for "lack of discovery of a valuable mineral"; one of the same grounds of invalidity as was involved in Best v. Humboldt.

The Findings of Fact of the District Judge are fully supported. The conclusions of law and Judgment of Dismissal follow naturally from Best v. Humboldt.

However, it is not necessary to support the dismissal on the basis of jurisdiction alone.

II

THE DISTRICT COURT HAD DISCRETION TO ALLOW THE ISSUE OF VALIDITY OF THE MINING CLAIM TO BE RESOLVED BY THE ADMINISTRATIVE AGENCY WITH SPECIAL EXPERIENCE AND EXPERTISE IN THESE MATTERS.

The judgment of dismissal which was not on the merits by the District Court was merely an act of "holding its hand until the issue of validity of the claim has been resolved by the agency entrusted by Congress with the task."

Best v. Humboldt, at page 340.

Although the District Judge felt it was a matter of jurisdiction based upon the holding in Best v. Humboldt, his dismissal can be supported on the basis of proper exercise of discretion.

It is, of course, settled practice for the federal courts to stay the exercise of their jurisdiction in appropriate circumstances to enable either a state court (See Railroad Commission of Texas v. Pullman Co., 312 U.S. 496; Burford v. Sun Oil Co., 319 U.S. 315; Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25; Leiter Minerals, Inc. v. United States, 352 U.S. 220, or an administrative tribunal (See e.g. Texas & Pacific Ry. v. American Tie Co., 234 U.S. 138; United States v. Western Pacific R. Co., 352 U.S. 59; Pennsylvania Ry. Co. v. United States 363 U.S. 202; Civil Aeronautics Board v. Modern Air Transport, Inc., 179 F.2d 622, 625 (C.A. 2); United States v. Railway Express Agency Inc., 89 F.Supp. 981 (D. Del.)). See also Jaffe, Primary Jurisdic-

tion Reconsidered, 102 U. Pa. L. Rev. 577, 584-592) to adjudicate issues peculiarly within its competence. This Court has pointed out that (Far East Conference v. United States, 342 U. S. 570, 574-575):

" * * * in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure."

The Department of the Interior is the expert agency established by Congress for adjudication of mining claims on the public lands. The intricacy of the factual determinations on which validity depends calls for the expertise which the agency possesses and which the courts would be hard put to duplicate. The number

and complexity of the validity proceedings which arise in connection with mining claims and are heard by the examiners in the Bureau of Land Management would seriously increase the already overcrowded dockets of the federal courts. In the circumstances, deference to the agency's authority to determine the validity of mining claims will not only promote the interest of sound and orderly judicial administration, but will also serve the purposes for which Congress created the agency and invested it with authority over such claims -- the encouragement of prospecting for minerals, conservation of resources and maintenance of the integrity of public lands -- by promoting a uniform and expert administration of the statutes and regulations.

The same reasons were urged by the Government in their Petition for Writ of Certiorari and in their briefs in the Supreme Court, for the reversal of the 9th Circuit Decision in Best v. Humboldt. Footnote 8, 371 U.S. 334, 339 recites the number of departmental cases being processed through the Department of Interior in the fiscal year 1960-1961. The Government warned that dire consequences would result from the Circuit Court decision because the District Courts would inherit this massive volume of litigation. The Government also warned that mining titles would become unsettled because of the District Court's dismissals by the District Courts in the 9th Circuit of a number of condemnation cases in reliance on administrative decisions which might not be res judicata; and that the District Court judges lacked the experience and expertise that resolution of issues of title relating to mining

claims required.

The Government argued that reasons of sound judicial and land management administration dictated the conclusion that the District Court had discretion to permit the validity of the mining claim to be determined in administrative proceedings before the Bureau of Land Management. The Government is now espousing the opposite point of view in the case at bench. This is not a case where "turn about is fair play".

Some of the problems of Best v. Humboldt arose from the fact that a condemnation case was involved, bringing into play Rule 71 of the Federal Rules of Civil Procedure. However, the basic principles and problems of judicial and administrative policy require that trespass actions be treated in the same manner as condemnation cases. In both situations, the issue of validity of unpatented mining claims are involved.

The interpretation which the Government argues in the case at bench, would have an effect of unsettling mining titles, which has been abhorred since the passage of the Mining Law of 1866. Miners, in 1858 were held to be trespassers on the public domain by the Federal District Court in United States v. Parrott. The Western Bloc in Congress sought legislation confirming existing mining titles which had been acquired through Congressional acquiescence and also the right to free mining on the public domain. The Mining Law of 1866 which was finally merged into The Mineral Location Act of 1872, (30 U S. C. 21 et seq.), represented a victory of the Western Bloc in their efforts to settle mining

titles. See generally *The American Law of Mining*, 1960, Vol. I, Chapters 1 and 2.

The only method of preserving the stability of mining titles is to decide on a uniform method of adjudication of their validity. Either the Department of Interior should have the exclusive right or the Courts. Neither mining claimants nor the Government should have the right to select the most favorable forum to suit any particular position.

Best v. Humboldt established that the Agency was the forum for adjudication of the issue of validity of mining claims. The Government in the case at bench demands the right to elect its forum while foreclosing the mining claimant from any right of election. Such preferential imbalance has no support in either theory, authority or policy.

Justice Douglas in Best v. Humboldt designates a mining claim as a unique form or property.

In Wilbur v. Krushnic, 280 U.S. 306, 316, 317 the court states:

"The rule is established by innumerable decisions of this Court, and of state and lower federal courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged and inherited without infringing any right or title of the United

States. The right of the owner is taxable by the state; and is 'real property' subject to the lien of a judgment recovered against the owner in a state or territorial court. . . . The owner is not required to purchase the claim or secure patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent. "

Cited with approval in Boesche v. Udall, 373 U.S. 472, 10 L. Ed. 2d 491, 83 S.Ct. 1373.

Union Oil of California v. Smith, 249 U.S. 3, 39 S.Ct. 30, 63 L. Ed. 336, elaborated on the possessory rights of a locator before he makes a discovery. In the case at bench, the contention is that there has been a failure to make a discovery and therefore the Nogueiras are merely trespassers without any rights. Union Oil of California v. Smith, explains it as follows:

" * * * in order to create valid rights or initiate a title as against the United States a discovery of minerals is essential. * * * [The Mining Law] extends an express invitation to all qualified persons to explore the lands of the United States for valuable mineral deposits and * * * hold out to one who succeeds in making discovery the promise of a full reward. Those who, being qualified, proceed in good faith to make such explorations and enter peaceably upon vacant lands of the United

States for that purpose, are not treated as mere trespassers, but as licensees or tenants at will. For since, as a practical matter, exploration must precede the discovery of minerals, and some occupation of the land ordinarily is necessary for adequate and systematic exploration, legal recognition of the *pedis possessio* of a bona fide and qualified prospector is universally regarded as a necessity. It is held that upon the public domain a miner may hold the place in which he may be working against all others having no better right, and while he remains in possession, diligently working towards discovery, is entitled -- at least for a reasonable time -- to be protected against forcible, fraudulent, and clandestine intrusions upon his possession."

[Citations omitted]

"And it has come to be generally recognized that while discovery is the indispensable fact and the marking and recording of the claim dependent upon it, yet the order of time in which these acts occur is not essential to the acquisition from the United States of the exclusive right of possession of the discovered minerals or the obtaining of a patent therefor, but that discovery may follow after location and give validity to the claim as of the time of discovery, provided no rights of third parties have intervened.

"In the California courts the right of a locator before discovery, while in possession of his claim and prosecuting exploration work, is recognized as a substantial interest, extending not only as far as the pedis possessio, but to the limits of the claim as located; so that if a duly qualified person peaceably and in good faith enters upon vacant lands of the United States prior to discovery but for the purpose of discovering oil or other valuable mineral deposits, there being no valid mineral location upon it, such person has the right to maintain possession as against violent, fraudulent, and surreptitious intrusions so long as he continues to occupy the land to the exclusion of others, and diligently and in good faith prosecutes the work of endeavoring to discover minerals thereon. Whatever the nature and extent of a possessory right before discovery, all authorities agree that such possession may be maintained only by continued actual occupancy by a qualified locator or his representatives engaged in persistent and diligent prosecution of work looking to the discovery of mineral." [Citations omitted]

Mr. Justice Pitney then pointed out that after discovery, actual and continuous occupation of a mining claim is not essential to preservation of property rights which can then be lost only through abandonment.

Appellants' authorities lend no support to its contention that the District Court has jurisdiction or discretionary authority to adjudicate the validity of a mining claim over the objection of the mining claimant after Best v. Humboldt.

On page 21 of this brief, we showed the circumstances under which Kennedy v. United States, 119 F.2d 564 and U.S. v. Schultz, 31 F.2d 764 were cited, in the Supreme Court Brief in Best v. Humboldt. They were cited as exceptions to the general rule promulgated by statutes, regulations and judicial precedents that the only tribunal open to a mining claimant to establish rights in mining claims against the United States of America, is in the Department of Interior, and that there existed no case making a determination of validity by a court at the request of a mining claimant over the objection of the United States of America. We deem this to be at variance with the argument on page 14 in the Appellant's brief in the case at bench.

Kennedy v. United States, 119 F.2d 564, holds just what the Government argues in the Supreme Court in Best v. Humboldt: that in a suit to quiet title by the United States, or to eject trespassers from public lands, the court would, as part of the general issue, determine whether there has been a valid mineral discovery.

Kennedy v. United States is distinguishable on the facts. The Kennedy case involved a stock raising homestead entry rather than a mining claim. The act providing for stock raising homesteads requires no formalities except residence for the prescribed period. The Land Laws (43 U.S.C. 231, 232) provide for excuse

from occupancy for a period not exceeding 5 months in aggregate in each year upon filing a notice in the local Land Office at the beginning of such period of absence. Except for such situation, the first time that any formal action is required, is at the expiration of the period of occupancy, when an application may be filed in the Land Office. Kennedy did not fulfil any of the requirements of residence. The District Court restrained Kennedy from occupying and grazing live stock on the land. The Ninth Circuit affirmed.

Rights under the homestead laws differ radically from rights under the mining laws. Kennedy was a trespasser: no interpretation of the facts could show that Kennedy had resided on the land for sufficient period to qualify him as a homestead patent applicant. In the case at bench, Appellees had acquired either post-discovery possessory rights, or 'pedis possessio' rights based upon occupancy and completion of the formal steps of location of the Grapevine Placer Mining Claim on May 1, 1961, giving them a status under the Statutes and the law that we have previously described.

Kennedy v. United States therefore has no application to the question of jurisdiction of the District Courts in mining cases.

U. S. v. Schultz, 31 F.2d 764, which Kennedy relies on, has not survived Best v. Humboldt, and is no longer the law. United States v. Toole, 224 F.Supp. 440, is not persuasive, since the question of jurisdiction was apparently not raised.

The Government stresses the cumbersome and burdensome process of achieving final adjudication of title in administrative

proceedings. The mining claimants in Best v. Humboldt expressed a preference for court adjudication rather than administrative adjudication on the same basis, and on the additional basis that standards of validity applied by the court were less restrictive than those applied by the administrative agency. Justice Douglas disposed of the latter point by saying if such were the case, these contentions could be raised in the administrative proceedings and reserved for judicial review. We can see no more justification in our case than in Best v. Humboldt to make a determination of jurisdiction and discretion based upon deficiencies in the administrative system of adjudication. More efficient and expeditious methods of handling public lands litigation is the concern of the Executive or Legislative branches of our Government, and not the courts.

The Government's contention that Judge Hall's decision and the necessity for determination by the agency with its incidental delays, would enable persons to continue in possession of void claims for long periods of time by use of the strategy of "relocation", is without merit.

The court in any case has no power to interfere with the right given by the Mining Laws to explore the public domain, even though a mining claim has been adjudicated to be null and void for lack of discovery.

Adams v. United States, 381 F. 2d 861.

In this case, Adams' claims were declared void for want of discovery. The District Court judicially reviewed the admini-

strative proceedings and Adams was enjoined from:

"(4) . . . doing any acts or things on these lands relating to or claimed to be related to any asserted mining claims or locations or any claim or assertion that the lands are mineral in character."

The Circuit Court affirmed the judgment of the District Court after modifying its judgment to eliminate the quoted portions of the decree which interfered with Adams' rights to continue his efforts to prospect for minerals upon the claims which had been declared invalid. It is a basic tenet of the Mining Laws that all valuable mineral deposits on lands belonging to the United States are "free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase * * *" 30 U. S. C. 22.

III

THE MERE FACT THAT A PREVIOUSLY
LOCATED CLAIM WAS DECLARED TO BE
INVALID IN AN UNREVIEWED ADMINISTRA-
TIVE DECISION [UNITED STATES v. MATTEY,
67 I.D. 63] DID NOT PREVENT THE CLAIM
FROM THEREAFTER BEING RELOCATED,
OCCUPIED AND PROSPECTED

The location of the Grapevine Placer Mining Claim on May 1, 1961 was a bona-fide relocation made for proper purposes.

The Government's Argument B raises the question of good faith. Other sections of the brief suggest fraud, misuse of the mining laws, waste or maliciousness. Nothing in the pleadings suggests any such issue. The complaint merely seeks to eject the

Appellees on the basis of a placer mining claim imperfected because of lack of discovery. Coleman v. United States, 363 F.2d 190 (9th Cir. 1966), (Certiorari has recently been granted) held that if the good faith of a mining claimant in locating the ground for the asserted purpose of exploiting the minerals therein, is an issue, the mining claimant should be put on notice of the issue in a complaint filed by the administrative agency. The same reasons for requiring the administrative complaint to state when any contention of bad faith is involved should apply with equal force to the District Court complaint. No such issue was raised by the pleadings in the case at bench. The Findings of Fact of the District Judge and the depositions and affidavits show that the claim was relocated for mining purposes by Robert A. Matthey, the predecessor in title of Appellees. The Hearing Officer's decision shows that the presence of fire clay was known to be present during the pendency of the agency proceedings, but that there was insufficient evidence of quantity. The Hearing Officer therefore rendered his decision on the basis of the shale which was then being used in the production sewer pipe. (See Appendix I to this Brief) Mr. Matthey's deposition shows that he filed his relocation on May 1, 1961, on the basis of the "fire clay" [which is a material of higher grade and less common variety than shale]. He made his location to attempt to develop a 'discovery' of fire clay to validate his location, and under these circumstances he leased the premises to Appellees with option to buy. Appellee Nogueira felt that there was an adequate supply of the fire clay and devoted his efforts to develop a

market therefor. If we assume that the marketability requirement for discovery expounded in Coleman v. United States, loc. cit. supra, was applicable to fire clay, then Appellees' efforts to interest the various clay companies in purchasing the material, was an effort to establish marketability and thus establish evidence of discovery. It would be strange if, under such circumstances, the court would be permitted to interfere in any way with the efforts of Appellees to establish marketability and perfect their location.

The record is replete with indications that the Noguerias were impeded in every step by the Forest Service and the Bureau of Land Management in their efforts to develop their fire clay and establish marketability.

There certainly were none of the abuses of the mining laws set forth in pages 18 through 20 of the Appellant's Brief. We concede that using a mining claim for the sole purpose of a fishing camp, a residence, a summer camp, a hunting lodge, or a saloon, or the like, does not fulfil the policy of the Mining Laws to promote the development of mineral deposits.

The facts in the case at bench, do not, as contended by the Government, show use exclusively for residential purposes, nor have Appellees admitted using the premises illegally or for purposes wholly unrelated to the mining development.

The Government's brief has pointed out that no issue is raised in this appeal of the right to Appellees to judicial review of the decision in 67 I. D. 63, decreeing that the original Grape Vine

Placer Mining Claim is invalid or by the counterclaim based upon the Mining Claims Occupancy Act (76 Stat. 1127, Act of October 23, 1962) alternatively contending Appellees to be residential occupants of the mining claim declared to be invalid in 67 I. D. 63. These counterclaims are therefore outside the scope of this appeal.

IV

APPELLEES OCCUPANCY WAS PROPER AND IS NOT SUBJECT TO INTERFERENCE.

Section 30 U. S. C. 612 permits mining claims to be used for several distinct purposes:

1. Prospecting
2. Mining
3. Processing
4. Uses reasonably incident thereto.

We have shown that the Placer Mining Claimant has the right of "pedis possessio" prior to the completion of his discovery which requires him to remain in continuous occupancy in order to protect his location .

The process of searching for valuable minerals is defined as "prospecting" and is different from "Mining". "Mining" is the process of extracting valuable minerals from the ground. "Processing" operations are the procedures of treating the minerals ores in various ways, such as screening, grinding, pulverizing, mixing, concentrating, smelting or otherwise removing the

valuable minerals from the waste materials.

Physical presence on the property is reasonably necessary and incidental to carry on any of the three operations of prospecting, mining or processing. It should be noted that the structures on the mining claims were being destroyed by vandals and Mr. Mattey originally sought some one to occupy the structures, to repair them and prevent further vandalism. Appellees entered into occupancy with the purpose of trying to exploit the mineral resources of the mining claim and they proceeded to make efforts to market the fire clay. Either they made a discovery or they did not. If they did not make a discovery, their occupancy would be necessary to protect their "pedis possessio". If they had established a discovery, they were entitled to occupy the structures as being incidental to the protection of the claim, and to the conduct of development of mining and processing operations.

There is no requirement in law or reason for compelling mining claimants to use a bed roll, tent or lean-to (conventional prospector's gear) rather than a more substantial structure that was already available on the claim. [This dwelling has recently been completely destroyed by fire, compelling the Appellees to occupy a warehouse area.]

Whether the occupancy was incidental to the prospecting, mining and processing operation, or wholly divorced and isolated therefrom, was a question of fact which Judge Hall resolved in favor of Appellees. The Findings of Fact, although they may have been determined on conflicting evidence, are not subject to attack

in this appeal.

We, of course, contend that each of the Facts are supported by uncontroverted evidence. The Findings of Fact, when fairly interpreted, imply that the possession and occupancy of the Grapevine Placer Mining Claim which was located on May 1, 1961, was incidental to its use for mining purposes, and the evidence supports such implication.

Appellees' occupancy of the Grapevine Placer Mining Claim was properly within the purposes of 30 U. S. C. 612.

CONCLUSION

The judgment of dismissal of the Government's trespass action as premature should be affirmed since the Grapevine Placer Mining Claim has not yet been contested administratively as required under the principles enunciated in Best v. Humboldt Placer Mining Co., 371 U. S. 334.

Respectfully submitted,

MILTON WICHNER

Attorney for Appellees

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Milton Wichner
MILTON WICHNER



UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Office of the Hearing Examiner
P. O. Box 3861
Portland 8, Oregon

May 7, 1957

CERTIFIED, RETURN RECEIPT REQUESTED

D E C I S I O N

United States of America,	:	
Contestant	:	California Contest #6796
	:	Involving the Grape Vine Placer Claim
v.	:	Situated in Lot 9, Section 4, Township
	:	4 South, Range 7 West, San Bernardino
Mary A. Matthey,	:	Meridian, California
Contestee	:	

Patent Protest Dismissed

The Acting Regional Forester, Region 5, United States Forest Service, San Francisco, California protested a patent application for the Grape Vine Placer Mining Claim by charging and alleging as follows:

1. No discovery of mineral has been made.
2. The land is non-mineral in character.

Notice of the charges was properly served on the contestee and a timely answer was filed in which the charges were denied. A hearing was held in Los Angeles, California pursuant to the Department of the Interior Rules of Practice (43 CFR Part 221) on January 29, 1957 to determine the truth of the charges. At the hearing an appearance on behalf of the contestant was made by Charles F. Lawrence, Attorney, Office of the General Counsel, United States Department of Agriculture, 216 Federal Building, Civic Center, San Francisco 2, California. An appearance on behalf of the contestee was made by Alfred D. Freis, Attorney at Law, 620 Story Building, 610 South Broadway, Los Angeles 14, California.

II

The witnesses who testified on behalf of the contestant were Joseph K. Munhall, and William L. Johnson. Mr. Munhall was the District Ranger, Trabuca District, Cleveland National Forest. William L. Johnson, an employee of the United States Forest Service, was qualified as a Mining Engineer. The witnesses who testified on behalf of the contestee were Clifford Tillotson and Bruner M. Burchfield. Mr. Tillotson was qualified as a manufacturer of ceramic sewer tile. Mr. Burchfield

was qualified as an expert in the field of ceramic materials. The minerals referred to as having been found on the claim were sedimentary clay or shale, and residual clay or fire clay.

The contestee witnesses stated that while the shale was the primary material found on the claim, residual clay had been found several months before the hearing. The limited testimony regarding this latter substance was insufficient to base a conclusion that there had been a discovery of residual clay in the quality and quantity necessary to satisfy the mining laws. Therefore, no further consideration was given to this material.

III

There appeared to be no dispute between the parties regarding the nature of the shale deposits, the uses of the material, or the amount of available shale in the area. Shale, ball clay, and residual clay at a ratio of approximately 65%, 15% and 20%, respectively, are blended to form the mix for vitrified sewer pipe. Ball clay is used as the bonding agent, residual clay is used as the reinforcing agent, and the shale, containing flux materials, is used as the bulk substance. The flux materials in the shale is the agent causing vitrification at economic temperature levels. While ordinary dirt could be used for the sewer pipe, the ratio of residual clay would have to be increased to 60%, flux materials would have to be added, and higher temperatures would have to be used. A contestee witness testified that the quantity of residual clays in the area was limited so that it was advantageous to use shale in order to reduce the amount of residual clays. Also, a contestee witness testified that common brick has greater porosity than sewer pipe so that any material which responds to incipient fusion by heat could be used for brick including ordinary dirt. The available shale deposit in this area in private ownership is limited, but there are vast deposits on government lands at less accessible locations. Also, there was evidence at the hearing that the claim was accessible and that there was a market for the shale material. From the testimony and evidence presented at the hearing I conclude that the shale deposits on the Grape Vine Placer Claim meet the test of marketability as defined herein.

The contestant contended (1) that the clay of the kind found on the Grape Vine Claim has never been subject to appropriation under the mining laws, and (2) that no valid discovery was made prior to July 23, 1955, and that since this date the discovery of the type of clay in question is not permissible. Therefore, the questions to be determined are whether the sedimentary clay or shale found on the claim was ever subject to appropriation under mining laws, and whether the effective date of the location was prior to July 23, 1955.

IV

The mining laws of the United States (30 U.S.C. Secs. 21 and 22) provide that only "valuable mineral deposits" may be located and that the lands involved must be "valuable for mineral". These laws have been construed to mean that if a deposit in land does not render its extraction profitable

and justify expenditures to that end, it is not a mineral deposit.
Eastman v. Miller, 197 U.S. 213, 322 (1905), Cameron v. United States,
5 U.S. 450, 459 (1920).

In applying this rule to deposits similar to the deposits in
issue, the Department had held that a showing must be made, that the
deposits can be removed and marketed to a profit. Opinion of Acting
Solicitor, 54 I.D. 294 (1933); Layman v. Ellis, 52 I.D. 714 (1929).
The rule was summarized by the Department in United States v. Strauss,
et al., 59 I.D. 129 (1945) at Page 138, as follows:

"Gypsum, clay, limestone, and other kinds of stone here
involved have been held to be minerals. W. H. Hooper,
1 L.D. 560 (1881); Alldritt v. Northern Pac. R. R. Co.,
25 L.D. 349 (1897); United States v. Barngrover et al.,
57 I.D. 533 (1942). But whether particular deposits of
these and other mineral substances of wide occurrence are
valuable mineral deposits within the contemplation of the
Mining Laws and whether the lands containing them are there-
fore subject to location and purchase under the Mining Laws
are questions of fact, held to depend upon the marketability
of the deposit. The rule long laid down by both the courts
and the Department requires that to justify his possession
the mineral locator or applicant must show that by reason
of accessibility, bona fides in development, proximity to
market, existence of present demand, and other factors, the
deposit is of such value that it can be mined, removed, and
disposed of at a profit. Ickes v. Underwood, et al., 78 App.
D.C. 396, 141 F. (2d) 546 (1944); opinion of Acting Solicitor,
54 I.D. 294 (1933); Layman v. Ellis, 52 L.D. 714 (1929).

The question of whether clay can be appropriated under the Mining
Laws has been before the Department on numerous occasions. Clays such as
kaolin or china clay (Alldritt v. No. Pac. R.R. Co.) 25 L.D. 340), fire
clay, (Holman v. Utah, L.D. 314), colloidal clay, (Ortmann 52 L.D. 469),
all have been declared to be subject to appropriation under the Mining Laws.
Clays usable only for ordinary brick have been held to be not subject to
appropriation under the Mining Laws. (King v. Bradford, 31 L.D. 108). However,
the latter decision has been criticized by text writers. Lindley on Mines,
6th Edition, Section 424 states:

"The manufactured product from a bed of brick clay, is more
commonplace than the porcelain obtained from kaolin, or
china clay, but we cannot understand why this should make
any difference. The element of value in both cases rests
upon the marketability of the manufactured product. Under
the English decisions, brick clay is classified as a mineral
under 'the railway clauses act,' and we can conceive of no
logical reason why, in the administration of the Federal
Mining Laws any discrimination should be made as between the
finer and coarser grades of a substance, if it can be extracted,
removed, and marketed at a profit."

In support of the first contention the contestant made reference to the Materials Disposal Acts of September 27, 1944 (58 Stat. 745) which authorizes the Secretary of the Interior to sell "sand, stone, gravel" and certain vegetative materials from public lands under the jurisdiction of the Department of the Interior, and of July 31, 1947 (61 Stat 681). The latter Act provides in part:

"the Secretary of the Interior, under such rules and regulations as he may prescribe, may dispose of materials including but not limited to sand, stone, gravel, yucca, manzanita, mesquite, cactus, common clay, and timber or other forest products on public land of the United States if the disposal of such materials (1) is not otherwise expressly authorized by law, including the United States Mining Laws, (2) is not expressly prohibited by the laws of the United States, and (3) would not be detrimental to the public interest. * * * (Emphasis added)

Also, reference is made to the legislative history of the latter Act including a letter from the Secretary of the Interior providing that the Act would apply to:

- "4. Common earth to be used for road fills, earth dams, stock-watering reservoirs, and similar uses.
5. Clay to be used for the manufacturing of bricks, tile, pottery and similar products."

The contestant suggests that the legislative history of the latter Act together with the regulation promulgated to administer the Act disclose a belief on the part of Congress that the materials referred to in the Act were not covered by the Mining Laws and that the Act was to provide the sole means for their disposition. After a careful examination of the legislative history and regulations I find no such belief or intent. It is my opinion that the Materials Disposal Act was intended merely to authorize the Secretary of the Interior to dispose of materials which were not subject to appropriation under the Mining Laws. This would include some of the common materials which were not found under the circumstances necessary to meet the marketability requirement summarized in the Decision in United States v. Strauss, (supra). Furthermore, it is my opinion that the determination of whether a particular substance can be appropriated under the Mining Laws must be based on the Mining Laws together with the various Judicial and Departmental interpretations of such laws.

Also, in support of contention No. 1 the contestant cited the decision in Anchorage Sand and Gravel Co. v. Schubert, 114 FS 436 (1952). In this decision the Court stated:

"to say that a discovery of gravel may be made in a large area of gravel open to view is to say that there can be a discovery of water in Cook Inlet or snow on Mt. McKinley. Such a perversion of the term did not only obliterate the safeguard referred to and result in the appropriation of large areas of the public domain to the detriment of the public, but it would also ignore the clause 'and the lands in which they are found' ".

After having found that there was an endless supply of the sand and gravel in the particular area under consideration the Court held that sand and gravel was not subject to appropriation under the Mining Laws. The Court supported its view by referring to the Materials Disposal Act of 1947 and stated:

"since this Act bears a close analogy to the Mineral Lands Leasing Act it would appear to follow that sand and gravel like the minerals specified in the latter Act were not intended to be disposed of under the Mining Laws."

Low grade materials such as sand and gravel found under similar circumstances have never been subject to location or appropriation pursuant to the Mining Laws. It is interesting to note that on appeal the decision was affirmed on the grounds that the land in question had been appropriated for other purposes and was therefore no longer unappropriated public land subject to appropriation under the Mining Laws rather than on the grounds that sand and gravel were not minerals.

In support of the second contention the contestant referred to the amended Materials Disposal Act of July 23, 1955 (61 Stat. 681) which eliminates "common varieties" of certain materials from the operation of the Mining Laws in "any mining claim hereafter located." This raises the question as to whether the effective date of the location for the Grape Vine Placer was prior to July 23, 1955.

The evidence on this subject was to the effect that the claim was located some 50 years ago, that the shale was removed from the claim in 1906 and again from 1908 to 1910, that the claim was not used again until Mr. Tillotson, the present lessee, began experimenting with the substance in 1953, and that since the Fall of 1956 Mr. Tillotson has been using the shale as one of the ingredients in the manufacture of ceramic sewer pipe. Having concluded that the shale presently meets the test of marketability I must conclude that it could have met the test at any time over the period of the past decade. If the contest had been initiated prior to 1953, it would probably have been rather difficult to prove marketability by the contestee. However, the burden of proving that the substance was not marketable would have been on the contestant so that whether the contestee could have effectively refuted evidence of non-marketability is pure speculation at this time. I must therefore conclude that the effective date of the location of the Grape Vine Placer Claim was prior to July 23, 1955.

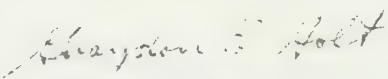
Also, the contestant refers to the 1955 Act as reasserting the authority of the Government to sell certain material and "made definite what had formerly been left to inference, that such material was not subject to the Mining Laws." Since the Act provides for "hereafter located" claims it is my opinion that the Act can not be extended to include locations made prior to the Act.

VI

From the foregoing it is my opinion that a shale deposit has been found on the Grape Vine Placer Claim under circumstances that meet the test of marketability, that because of the flux materials in the shale, the shale is usable for purposes other than for the purpose of making common brick and that the effective date of the location was prior to July 23, 1955. Therefore, I conclude that there has been a discovery of a valuable mineral and that the land in question is mineral in character. Accordingly, the Forest Service protest is dismissed.

VII

This decision is subject to the right of appeal to the Director of the Bureau of Land Management. An appeal must be received by the Hearing Examiner, Bureau of Land Management, Post Office Box 3861, Portland 8, Oregon, within 30 days from receipt hereof. Copies of notice of appeal and other documents must be served on the representative of the adverse party at the address appearing in Paragraph I of this decision. Full compliance is required with 43 CFR, Sections 221.1 to 221.5 inclusive, and to other pertinent sections of the Rules of Practice, Circular 1950, effective May 1, 1956, as amended by Circular 1962, effective October 4, 1956.


Graydon E. Holt
Hearing Examiner

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Standard Distribution List

In reply refer to:
California Contest No. 6796
5.04g

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Land Management
Washington 25, D. C.

December 22, 1958

Certified Mail
Return Receipt Requested

DECISION

United States
v.
Mary A. Matthey

:
:
: Placer Mining Claim
:
:

Decision Affirmed

Contest proceedings were initiated by the United States Forest Service in its protest against the patent application of Mary A. Matthey for the Grape Vine Placer Mining Claim situated within the Cleveland National Forest. The protest charged that no discovery of mineral has been made on the claim and the land is nonmineral in character. After hearing in the contest the Hearing Examiner, by decision of May 7, 1957, held the mining claim to be valid. The Forest Service, contestant-appellant, has appealed from that decision.

The appellant contends that the contestee attempted to locate a deposit of common clay or shale for which he has a present use and present market in the manufacture of ceramic sewer tile, and that such material has never been locatable under the mining laws. It further contends that there was no valid discovery prior to the effective date of the act of July 23, 1955 (30 U.S.C. sec. 611), and since that date clay deposits of the type here involved have been disposable only under the Materials Act of 1947, as amended (30 U.S.C. secs. 601-604). The contestee, on the other hand, contends that the clay on the mining claim is not of a common variety but is a valuable and locatable mineral under the mining laws and that a sufficient discovery has been made within the boundaries of the claim to warrant the issuance of patent, the clay having been and being presently marketed at a profit.

The Grape Vine Placer was located some 50 years ago; it has been worked intermittently for the clay shale therein contained. The type of shale presently mined is similar to that which is found common in many areas and which is abundant in inaccessible reaches of Government lands. However, the shale on the contested claim was shown to be peculiarly valuable because of the chemical composition of the clay and the flux materials contained therein for the manufacture of ceramic sewer tile. From 1953 to 1956 a manufacturer of ceramic sewer tile made

Experimental tests of the shale on the Grape Vine claim and since the fall of 1956 has been using the shale from the claim in the manufacture of ceramic sewer pipe. The marketability of the shale appears to be established.

The mere fact that lands contain deposits of a common variety of, or ordinary, clay is not in itself sufficient to bring them within the class of mineral lands even though some slight use may be made commercially of such deposits. There may be, however, deposits of clay of such exceptional nature as to warrant the classification of the lands containing them as mineral lands. Holman et al., v. State of Utah, 41 L.D. 314 (1912). Common varieties, as defined by the Department and the courts include deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. 43 CFR 185.121(b).

The Examiner properly found, under the rule summarized in United States v. Strauss, 59 L.D. 129,138 (1945), that the clay within the Grape Vine claim, usable for purposes other than the making of common brick and peculiarly valuable because of its physical composition, including flux material, in the manufacture of sewer tile, was a discovery of a clay of a distinct and special economic value so as to constitute a discovery of a valuable mineral and that the land involved is mineral in character. Since the question concerning the effect of the Materials Act was interjected, he deemed it necessary to pass on whether a location of a "common varieties" material was made prior to July 23, 1955; he found the effective date of location to be prior to that date.

The record clearly establishes an existing special or distinct mineral value in the particular type clay found on the claim and that that clay has had a past, enjoys a present, and has a future prospective value; it has been and is presently marketed. See Layman et al., v. Ellis., 50 L.D. 714, (1929). It is not at present necessary to rule on whether "common varieties" of clay is included within the contemplation and purview of the act of July 23, 1955 as removed from the classification of valuable mineral, or whether it was omitted intentionally or otherwise from section 3 of the Act. It is merely necessary to note, even if clay were named as a mineral removed from the classification of valuable mineral, the deposits here concerned would, nevertheless, be excepted therefrom because " 'Common varieties' as used in sections 601,603, and 611-615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value ***." 1/ Therefore, it matters not whether the effective date of location was prior or subsequent to July 23, 1955. The decision appealed from is modified accordingly and affirmed as modified.

The Manager, when this decision becomes final, is directed to take such steps for the further processing of the patent application as is appropriate in the premises.

The Forest Service is allowed the right of appeal to the Secretary of the Interior in accordance with the regulations in 43 CFR Part 221, as amended. See enclosed Form 4-1365. In taking an appeal there must be strict compliance with the regulations.

In the event of an appeal the adverse party to be served is: Mary A. Matthey by her attorney, Alfred D. Freis, 610 So. Broadway, Los Angeles 14, California.


Director

Enclosure

DISTRIBUTION:

U. S. Department of Agriculture, Office of General Counsel
Att: Jesse R. Farr, Attorney in Charge (Certified Mail)
Alfred D. Freis, Attorney at Law (Regular Mail)
Mary A. Matthey (Regular Mail)
Minerals Staff Officer (5)
Mr. John Sieker, Forest Service, Department of Agriculture (8)
Hearings Administrative Officer
Appeals List No. 1
F

No. 21754

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant

v.

EDISON R. NOGUEIRA, ET AL., Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE UNITED STATES

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FILED

FEB 28 1968

WM. B. LUCK, CLERK

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REPLY BRIEF FOR THE UNITED STATES

STATEMENT

Without delineating all the detailed evidence relating to facts upon which the court made no finding, brief reply to some assertions of appellees seems appropriate.

1. Appellees say this was a going mine until the Secretary of the Interior held that the mineral was a common clay (Br. 14). Robert Matthey so asserted at one point early in his testimony by deposition (R. Dep. 13). As the examination proceeded, he testified that in the past he had sold a lot of clay to Mr. Tillotson but had never lived there, that there was a man named Joe Bowers living on the claim at one time, that between 1960 and 1961, no one lived there and he

visited it once a month to check on the equipment and that he knew of the Interior Decision but that "I thought we could continue on mining it, but we could never get a patent under this procedure" (see R. Dep. 24-31). This testimony falls far short of showing unequivocally continuous mining operations being conducted on the premises.

Mattey's statement quoted above, contradicted the assertion (Br. 14-15) that the "mine was not operated because of obstacles put up by the Forest Service." This latter argumentative assertion by Mattey (R. Dep. 49) contrasts with the fact that this law suit is necessary because of appellees' refusal to accede to demands of the Forest Service to surrender possession. Moreover, the first letter on this subject appears to be in April 1962, 11 months after the purported location of the new discovery in May 1961. (See Exhibit 1 to M. Dep.) Neither at the time nor later until this suit was brought is there any indication of any physical action taken by the appellees to mine, explore or develop the claim. The vague assertions of Edison Nogueira are as follows (E. Dep. 12-13):

Q. Did you personally ever dig out any of the clay or material that was on the mine, personally yourself?

A. Yes.

Q. When did you do this?

A. Oh, most every week when I stay here I go around all the mines and look.

Q. What did you do with it?

A. Try to locate the veins of the mine and to look to the deposits of all the places.

Q. Have you ever sold any material from the mine?

A. No, we do not sold one material at all.

Q. Did you store the samples that you took, have you stored them any particular place on the area?

A. We did, the companies they have some reports, samples and laboratory tests they have.

Q. You are talking about the McBean Company?

A. McBean or the Riverside -- South Pacific Clay Company and Riverside Cement Company made the report.

Q. Their samples were taken in 1962 and '63; is that correct?

A. Yes.

Q. Have any samples been taken since 1962 or '63?

A. Was not necessary. I told Maria was not necessary to do any more sampling because we sample, since 1903 thought I have same every day for that we prove good.

Q. Prove good in 1903?

A. Yes. Since that years the clay has been proven fire clay.

In contrast, affidavits by Forest Service employees included statements of Edison that he had not engaged in mining operations since occupying the premises and that physical inspection revealed no signs of recent mining operations (R. 94-95, 121). The only definite information concerning the negotiations which appellees' brief characterizes as "efforts to exploit the fire clay" related to the Gladding-McBean Corporation and its successor International Pipe & Ceramics Corporation. An official of that company stated that Mr. Nogueira had approached them in March 1962 concerning clay (without making any distinction as to fire clay); that the probability of getting clay from a property owned by Mr. Tillotson was discussed; that "He told us of the Matthey claim suit and that Nogueira was no more than a squatter;" and in September, Mr. Nogueira was told to stop bothering that company's people at its Corona facility (R. 122-123).

ARGUMENT

I

SUMMARY DISMISSAL OF THE CLAIM OF THE UNITED STATES TO POSSESSION AND TO TRESPASS DAMAGES WAS NOT WARRANTED

There can be no dispute as to the jurisdiction, indeed obligation, of the district court to award the United States

an order of possession and damages for past trespass, absent some right of the defendants to exclusive possession ~~as~~ against the United States (U.S. Br. 11-12).^{1/} Appellees seek to rely upon a right of prospecting which they define as "searching for valuable minerals" as distinguished from mining--"extracting valuable minerals from the ground" (Br. 37). What possession might be justified under prospecting rights has nothing to do with this case. Appellees admittedly performed no act relating to "searching" for anything in the ground. Nor did Robert Matthey. He said "I refiled on this claim again, using fire clay as a new discovery as my contention of validity" and that "we always knew that this [the fire clay] was there" (R. Dep. 7, 12). The extent of a prospector's right to possession for that purpose is plainly irrelevant to this case.

Appellees' only other attempt to justify their continued possession is that Judge Hall had resolved a disputed question of fact "on conflicting evidence" that the occupancy was "incidental to the prospecting, mining and processing operation" (Br. 38). Obvious and complete answers are (1) Judge Hall did not purport to make any such fact finding in the only finding

^{1/} Our opening brief will be so cited.

of fact on the subject which states that defendants "are in possession of and occupying" the claim (meaning the physical tract of land) (Fdg. 3, R. 152), and that they are in possession "as successors in interest to Robert A. Matthey" (Fdg. 7, R. 153), without any mention of nature or character of possession, (2) any such finding would have been clearly contrary to the undisputed evidence, (3) such a finding cannot be used to support summary judgment, (4) such a finding cannot possibly support a conclusion of law that "this Court has no jurisdiction to determine the right of the defendants to occupy the GRAPEVINE placer mining claim" (R. 153), and (5) such finding does not contain the subsidiary specific findings necessary to demonstrate the basis for the court's conclusion. United States v. Forness, 125 F.2d 928 (C.A. 2, 1942), cert. den., 316 U.S. 694.

II

THE DISTRICT COURT HAD JURISDICTION IN THIS CASE TO PASS UPON THE VALIDITY OF THE 1961 MINING LOCATION

A. Best v. Humboldt, 371 U.S. 334 does not preclude jurisdiction. - Little need be added to our discussion of this matter in our opening brief (pp. 13-17). Best does not in terms reject this Court's Kennedy and Schultz cases even though they

were, as appellees recognize (Br. 21), specifically called to the attention of the Court. The fact that Kennedy involved a stock raising homestead entry rather than a mining claim (Br. 31-32) is, in our view, no distinction on the jurisdictional question. Schultz, upon which Kennedy relied did involve a mining claim, hence appellees are compelled to say it "is no longer the law" (Br. 32). We disagree.

Appellees' quotations (Br. 18, 21) as to the exclusive authority of the Department of the Interior concerning legal title are not directed to the present problem, which concerns the right to possession. Schultz, as quoted in Kennedy, made this distinction clear (see U.S. Br. 13). Appellees also discuss here the possessory rights of location before discovery (Br. 28-30, 33-34). Since, as noted supra, p. 4, we do not have a miner "in possession, diligently working towards discovery" (Br. 29) that principle is of no aid to appellees.

B. The Court does not have discretion to refuse to exercise its jurisdiction. - The United States has a right to the relief to which it is entitled (U.S. Br. 12). The abstention doctrine invoked by appellees (Br. 23-24) has no application here. Zwickler v. Koota, O.T. 1967, No. 29, decided

December 5, 1967, states:

The judge-made doctrine of abstention, first fashioned in 1941 in Railroad Commission v. Pullman Co., 312 U.S. 496, sanctions such escape [from existent federal court jurisdiction] only in narrowly limited "special circumstances." Propper v. Clark, 337 U.S. 472, 492.

There are no such "special circumstances" in this case.

C. The 1961 purported discovery is no defense to this action if it were not a bona fide location made for the purpose of mineral development. - Appellees rely upon language of Coleman v. United States, 363 F.2d 190 (C.A. 9, 1966), reh. den., 379 F.2d 555 (1967), cert. granted 389 U.S. ___, discuss matters concerning the original administrative proceedings and then stray off to other matters (Br. 34-37). No issue of good faith was raised in the administrative proceedings as to the original location which was invalidated for a lack of discovery. There have been no administrative proceedings as to the 1961 alleged relocation. Thus, the validity of language in Coleman as to what procedural requirements are applicable to good faith attack upon locations in administrative proceedings is not in issue here.

The complaint in this case was based upon the final administrative decision declaring the original location void

for lack of discovery (R. 1-4). It was only in appellees' answer that an issue was raised as to purported right to possession under the location filed in 1961 (R. 8-14). The Federal Rules of Civil Procedure provide, so far as here material, only for a complaint and an answer and that "No other pleading shall be allowed" (Rule 7(a)) and that "Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided" (Rule 8(d)). Any pleading attacking the validity of the 1961 location whether for lack of good faith or for other reason was thus specifically precluded.

CONCLUSION

It is submitted that the judgment of dismissal should be reversed with directions to order ejectment of the defendants and the award of trespass damages.

Respectfully,

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Assistant Attorney General.

WM. MATTHEW BYRNE, JR.,
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CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROGER P. MARQUIS
Attorney, Department of Justice
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N O. 2 1 7 5 7

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TYRONE WOODS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

MAR 20 1968

WM. S. LUCK, CLERK

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
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MAR 22 1968

N O. 2 1 7 5 7
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TYRONE WOODS,

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vs.

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N O. 2 1 7 5 7
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TYRONE WOODS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS AND FACTS
DISCLOSING JURISDICTION

On August 17, 1966, the Federal Grand Jury for the Southern District of California returned an indictment in one count charging appellant Tyrone Woods with a violation of Title 18, United States Code, Section 2113(a) [C. T. 2]. ^{1/} The indictment charged that on or about July 29, 1966, appellant, by force and violence and intimidation, robbed the Security First National Bank, 39th and Western Branch, and teller Sally Miranda of \$240.

^{1/} C. T. refers to Clerk's Transcript.

On August 29, 1966 appellant was arraigned, pleaded not guilty and requested a jury trial [C. T. 16]. A jury trial was commenced on September 26, 1966 before the Honorable Charles H. Carr, United States District Judge.

On September 29, 1966 a verdict of guilty was returned by the jury and on October 19, 1966 judgment of conviction was entered. Appellant was sentenced to the custody of the Attorney General for 15 years [C. T. 22]. On October 26, 1966 appellant filed a timely Notice of Appeal [C. T. 24].

Jurisdiction of the District Court was based on Title 18, United States Code, Section 3231, and Title 18, United States Code, Section 2113. Jurisdiction of this Court is based on Title 28, United States Code, Section 1294(1) and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATUTES INVOLVED

Title 18, United States Code, Section 2113(a) provides in pertinent part:

"Whoever, by force and violence or by intimidation, takes or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, management, or possession of, any bank. . . ." [shall be fined not more than \$5,000 or imprisoned not more

than 20 years or both].

III

QUESTIONS PRESENTED

I. Whether the defendant's statement obtained after a full Miranda warning and waiver was properly admitted into evidence.

II. Whether a fingerprint exemplar taken from the defendant in absence of counsel was properly admitted into evidence.

IV

STATEMENT OF FACTS

On Friday, July 29, 1966, at about 1:35 p.m. a lone bandit robbed teller Sally Miranda of the Security First National Bank of \$240. In the process, the robber handed Miss Miranda a note (Government's Exhibit No. 1) which threatened her life and demanded all her money [R. T. 46]. Miss Miranda positively identified appellant Woods as the man who robbed her [R. T. 50]. She also testified that during the robbery she pushed a button activating surveillance camera in the bank, and identified the photographs from that

2/ R. T. refers to Reporter's Transcript.

The note states: "June 11, 1966, \$2,200. This is a hold-up. I have a gun and will use it. If anything happens to me someone close to you will be shot. I know where you live, make this look like a large withdrawal. Don't say anything for five minutes. Count the money."

camera (Government's Exhibits 3-12) as being those of defendant Woods while he was committing the robbery [R. T. 51, 90]. A passerby saw appellant fleeing from the bank at about 1:30 p. m. on July 29, 1966 [R. T. 101]. A Los Angeles Police Department Fingerprint Expert testified that partial palm prints taken from teller Miranda's counter at the bank (Government's Exhibit No. 21) and from the demand note (Government's Exhibit No. 1) matched those of defendant Woods (Government's Exhibit No. 24) [R. T. 200-264].

Appellant called witnesses and testified himself to the effect that he was at home in bed at the time of the robbery. Co-defendant Eli Carter, who was identified as the man driving the getaway car, was acquitted by the jury.

Appellant and Eli Carter were arrested at about 3:30 p. m. on August 1, 1966 outside of Carter's house by Sergeant Henry Seret of the Los Angeles Police Department. At the time of arrest, Sergeant Seret advised appellant of his constitutional rights. In substance he told defendant Woods that he was under arrest for robbery, that he had a right to legal counsel at all times, that if he could not afford counsel one would be supplied him, that anything he said could be used against him in further proceedings, and that statements he made must be freely and voluntarily made [R. T. 591, 595, 596, 669, 679, 680]. Seret then told Woods to "think that over on the way to the station. We are not going to talk to you until we get there." [R. T. 569, 596]. Appellant was then taken to the Police Building [R. T. 676].

Approximately one hour later, at 4:30 p.m., Sergeant Seret and defendant Woods were joined by Agent James A. Mills of the Federal Bureau of Investigation in a room at the Police Administration Building [R. T. 669, 685, 705]. At this time, Woods was again advised of his rights by Agent Mills [R. T. 705, 707, 708]. The Agent "advised him of the nature of our investigation to begin with, of the identity of the two men in the room, Sergeant Seret and myself, and then I advised him that he has a right to remain silent and to make no statement. I advised him he has a right to consult with an attorney or anyone else of his own choice, that he has a right to have an attorney present during any interrogation, and prior to answering any questions, and that if he cannot afford an attorney, at a proper time one will be appointed for him." (emphasis added) [R. T. 710]. After being advised of those rights, Woods was asked if he understood the meaning of those rights. He stated that he did [R. T. 707]. He was then asked if he desired to discuss his activities of Friday, July 29, without consulting with an attorney or having an attorney present at that time [R. T. 708].

At this time, there was a brief conversation between Woods and Sergeant Seret which the Agent did not hear [R. T. 706, 710, 711].

Woods' brief statement to Sergeant Seret conflicted slightly with his testimony at trial and led officers to impeaching evidence [R. T. 688, 692, 693].

In substance, the defendant told Sergeant Seret that he was

in bed all day Friday (July 29, 1966) until late afternoon or evening and that he didn't go out until that night [R. T. 688]. At trial, defendant said he stayed in bed until 3:30 p.m. and then had gone to Eli Carter's house [R. T. 409]. He also stated to Sergeant Seret that he owned a 1961 Thunderbird and that it is in a repair shop on Flower Street [R. T. 693]. Evidence at trial showed that defendant Woods had made an \$80 payment to the repair shop on July 29, 1966 [R. T. 718].

After making this brief statement, the defendant said, "I don't want to talk any more about this. I want an attorney." [R. T. 692]. At this time, questioning ceased [R. T. 692, lines 11-17; 713, 714]. Appellant denied that Sergeant Seret advised him of his rights or that he spoke to Sergeant Seret [R. T. 441, 442].

V

ARGUMENT

- A. ADMISSIONS OF APPELLANT WERE PROPERLY ADMITTED INTO EVIDENCE AFTER A SHOWING THAT CONSTITUTIONALLY REQUIRED WARNINGS WERE GIVEN AND THAT A WAIVER OF RIGHTS WAS OBTAINED PRIOR TO QUESTIONING.
-

In Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966) the Supreme Court held that "the prosecution may not use statements whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards to secure the privilege

against self-incrimination.

It is apparent that such procedural safeguards were used in this case. Appellant claims that the defendant was not adequately advised of his right to have court appointed counsel present during interrogation. However, the record demonstrates that the facts are otherwise.

On August 1, 1966, at 3:30 p. m., the appellant was advised that he had a right to counsel at all times and that if he could not afford counsel one would be supplied him [R. T. 591, 595, 596]. He was then told to "think that over" [R. T. 569, 596]. About one hour later he was advised of his 5th Amendment right to remain silent and to make no statement. He was advised that he would be helped to protect that right by consulting with an attorney or anyone else of his own choosing. He was advised that he had a right to have an attorney present during any interrogation, and prior to answering any questions. He was advised that if he did not have funds, at a proper time an attorney would be appointed [R. T. 710]. Woods indicated that he fully understood those rights and then had a brief conversation with Sergeant Seret. When he indicated that he had said enough and wanted an attorney, questioning immediately ceased [R. T. 692]. A knowing and intelligent waiver of rights is shown by the fact that Woods was advised of his rights by Seret and given an opportunity to dwell upon them; that he was again advised fully by Agent Mills immediately prior to the statement; that he stated he understood his rights; that he chose to speak briefly without an attorney after he was asked whether he desired to make a

statement without an attorney; and that he changed his mind after making the brief statement, refused to say anything more, and asked for an attorney. Under these particular facts and circumstances the waiver was sufficient under the Miranda standards. United States v. Hayes, 385 F.2d 375 (4th Cir. 1967).

The above indicates that the Police Officer and FBI Agent scrupulously complied with the Miranda directives although the interview in question occurred little more than a month after that case was decided. This record clearly shows that the appellant was explicitly advised that he had the right to court appointed counsel prior to answering any questions and during any interrogation.

Miranda did not require that each police station have a lawyer present to advise prisoners. 384 U.S. at p. 474. In explaining the meaning of its decision, the Miranda court stated:

" . . . if police propose to interrogate a person they must make it known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation." 384 U.S. at p. 474.

The Miranda court further admonishes:

"The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by the

defendant." 384 U.S. at 476 (emphasis added).

In Keegan v. United States, 385 F.2d 260 (9th Cir. 1967), this Court held the following warning to be an effective equivalent.

"You don't have to say anything without the presence of an attorney. Anything that may be said out of the presence of an attorney could be held against you in a court of law. If you don't have funds to pay for an attorney, we will appoint one." Keegan, supra, at 262, 264.

"Surely Miranda is not a ritual of words to be recited by rote according to didactic niceties." Coyote v. United States, 380 F.2d 305 (10th Cir. 1967). What Miranda does require is meaningful advice to the unlettered and unlearned in language which can be comprehended and on which he can knowingly act. Coyote, supra, at page 308. The Coyote court accordingly held that warning to the effect that the defendant " . . . can talk to a lawyer or anyone before saying anything, and that the judge will get me a lawyer if I am broke" was sufficient under Miranda.

Clearly the warning and waiver in this case constituted sufficient safeguards, and appellant's privilege against self-incrimination was thoroughly protected.

B. THE FINGERPRINT EXEMPLAR WAS
OBTAINED LAWFULLY AND WAS
PROPERLY ADMITTED INTO EVIDENCE.

Appellant admits that he had no constitutional right to refuse to furnish his fingerprints. He cites no case which holds that he is entitled to counsel when giving fingerprints. Nor does he offer any cogent reasons which would support that dubious conclusion.

United States v. Wade, 388 U.S. 218 (1967) applies to an entirely different situation, and even then applies only to identification confrontations occurring after June 12, 1967 which is approximately one year after the fingerprint proceedings in this case.

Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199.

The applicability of Gilbert v. California, 388 U.S. 263 (1967) is well stated by the Supreme Court in its discussion of the obtaining of handwriting from Gilbert in the absence of counsel.

"The taking of the exemplars was not a 'critical' stage of the criminal proceedings entitling petitioner to the assistance of counsel. Putting aside the fact that the exemplars were taken before the indictment and appointment of counsel, there is minimal risk that the absence of counsel might derogate from his right to a fair trial. Cf. United States v. Wade, supra. If, for some reason, an unrepresentative exemplar is taken, this can be brought out and corrected through the adversary process at trial since the accused can make an unlimited number of

additional exemplars for analysis and comparison by government and defense handwriting experts. Thus, 'the accused has the opportunity for a meaningful confrontation of the [State's] case at trial through the ordinary processes of cross-examination of the [State's] expert [handwriting] witnesses and the presentation of the evidence of his own [handwriting] experts.' " United States v. Wade, supra, at 227-228.

VI

CONCLUSION

Since the statements and fingerprint exemplars were lawfully obtained and properly admitted into evidence, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Michael D. Nasatir

MICHAEL D. NASATIR

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NITA S. VELA, CHRISTIE L. VELA, a
minor, by and through RUDOLFO R.
VELA, her father and next friend,
ANDREA LASSEN, a minor, by and
through JACK G. LASSEN, her father
and next friend, and KATHRYN ANDERSON,
a minor, by and through ROY ANDERSON,
her father and next friend,

Appellants,

vs.

GOVERNMENT EMPLOYEES INSURANCE COMPANY
c/o GUAM INSURANCE ADJUSTERS,

Appellee.

On Appeal from the District Court of Guam

APPELLEE'S BRIEF

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FILED

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WM. B. LUCK, CLERK

NOV 15 1967

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No. 21758
IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NITA S. VELA, et al,

Appellants,

vs.

GOVERNMENT EMPLOYEES INSURANCE COMPANY
c/o GUAM INSURANCE ADJUSTERS,

Appellee.

On Appeal from the District Court of Guam

APPELLEE'S BRIEF

PRELIMINARY STATEMENT

"This appeal presents the question of whether in the territory of Guam, a claim which arises from the negligent operation of a motor vehicle and which is permanently abated as against the tortfeasor because of his death may be successfully prosecuted against his automobile insurer under a Guamanian statute permitting such insurer to be sued directly. Capital Insurance and Surety Company v. Kelley (9th Cir. 1966) 361 F. 2d 567, 568.

STATEMENT OF CASE AND FACTS

The appellant, Nita S. Vela, was driving a car owned by her husband and herself on January 2, 1966, when it was involved in an accident with a car driven by Charles L. Hofer who was killed in the accident. Appellant, Nita Vela, was

1 seriously injured and , of her eight passengers, seven, in-
2 cluding the other appellants, Christie L. Vela, Andrea Lassen
3 and Kathryn Anderson, were also injured. The accident took
4 place on a public highway of the Territory of Guam, near the
5 entrance of the Naval Communications Station.

6 On March 22, 1966, a complaint was filed against
7 defendant and appellee Government Employees Insurance Com-
8 pany which insured both the Hofer and Vela automobiles, pur-
9 suant to Section 43354 of the Government Code of Guam which
10 provides for direct action against the insurer of the tort-
11 feator "within the terms and limits of the policy." The
12 complaint specifically charged appellee Government Employees
13 Insurance Company with liability under the terms of its
14 policy No. 216-27-25, issued to Charles L. Hofer and effec-
15 tive on August 12, 1965.

6
7 On December 5, 1966, an Order for Summary Judgment
8 was granted by Judge Paul D. Shriver in the District Court
9 of Guam. The summary judgment released Government Employees
0 Insurance Company "as to any claims of plaintiffs herein
1 involving Government Employees Insurance Company Policy No.
2 216-27-25 issued to Charles L. Hofer, defendant company's
3 insured, which said policy was effective as of August 12,
4 1965."

5 It was further "ordered, adjudged and decreed that
6 this cause of action be dismissed without prejudice as to

1 the rights of plaintiffs herein to claim under any other
2 policy issued by the defendant Government Employees Insurance
3 Company;. . ."

4 On December 19, 1966, a notice of appeal to this Court
5 was filed in this cause.

6 STATEMENT OF QUESTION PRESENTED

7 1. Did the United States District Court of Guam pro-
8 perly grant a summary judgment in the above titled cause?

9 2. Did the United States District Court of Guam pro-
10 perly apply the provisions of Government Code of Guam, section
11 43354?

12 ARGUMENT

13 I. THE TRIAL COURT PROPERLY EXERCISED ITS POWER TO
14 GRANT SUMMARY JUDGMENT IN THIS INSTANCE SINCE THE
15 CASE PRESENTED NO ISSUE OF FACT.

16 Rohner v. Union Pac. R. Co. (CA Colo. 1955) 225 F. 2d
17 272, 274, held that "the intended purpose of this summary
18 judgment provision is to enable the trial court to readily
19 dispose of cases on matters of law where it becomes evident
20 no factual controversy of fact remains." Further, in Byrnes
21 v. Mutual Life Insurance Company of New York (CA Ariz. 1955)
22 217 F. 2d 497, 500, certiorari denied 75 S.C. 532, 348 U.S.
23 971, 99 L. Ed. 756, the court stated that "the object of
24 procedure for summary judgment is not to determine an issue,
25 but to determine whether there is an issue to be tried."
26 Also in Schreffer v. Bowles (10th Cir. 1946) 153 F. 2d 1, 3,

1 the court stated that "the statutory purpose of rule 56 is
2 to permit speedy and expeditious disposal of cases where the
3 pleadings do not as a matter of fact present any substantial
4 fact for determination." Also see, General Beverages, Inv.
5 v. Rogers (10th Cir. 1954) 216 F. 2d 413.

6 Appellant argues that the court erred in granting the
7 motion for summary judgment in that there existed in the
8 "file" a copy of appellant's insurance policy taken out through
9 appellee, Government Employees Insurance Company. This posi-
0 tion is not understandable. Appellant merely states that
1 since appellee insured both cars, by amendment appellants
2 Andrea Lassen and Kathryn Anderson could also state a cause
3 of action against appellee. The only interpretation to this
4 sentence which could justifiably be construed to give appel-
5 lants a cause of action would be that the amendment refers
6 to the policy insuring appellant Nita Vela's car. This
7 argument has no merit.

8 Referring to the order granting motion for summary
9 judgment, the court states:

0 "It is further ordered, adjudged and decreed
1 that this cause of action be dismissed with-
2 out prejudice as to the rights of plaintiffs
3 herein to claim under any other policy issued
4 by the defendant Government Employees Insur-
5 ance Company; and it is further ordered that
6 plaintiffs recover nothing by this suit and
7 the defendant Government Employees Insurance
8 Company have its costs."
9 (Emphasis added.)

0 Even if appellants could recover under Nita Vela's

1 policy, which is not admitted, appellant is limited to the
2 cause of action stated.

3 The case of Superior Manufacturing Corp. v. Hessler,
4 (CA Colo. 1959) 267 F. 2d 302, certiorari denied 80 S.C. 139,
5 361 U.S. 876, 4 L.Ed. 2d 114, states:

6 "An amended pleading is one which clarifies
7 or amplifies a cause of action which can be
8 identified with certainty as the same cause
9 of action initially pleaded or attempted to
be pleaded, and it is a perfection of an
original pleading rather than the establish-
ment of a new cause of action."

10 Appellant should not be allowed to amend his complaint
11 to state a cause of action against appellee under a new
12 policy involving a different insured and involving different
13 issues of fact.

14 In paragraph III of their complaint, appellants allege:

15 "That upon information and belief, on the 2nd
16 day of January, 1966, the defendant, Govern-
17 ment Employees Insurance Company, had in full
18 force and effect, a policy of insurance issued
19 to deceased, Charles L. Hofer, insuring said
20 vehicle against loss on account of personal
21 injury or property damage caused by negligence,
neglect or want of care of said insured. That
under the provisions of Section 43354 of the
Government Code of Guam, plaintiffs have a
right of direct action against the defendant,
Government Employees Insurance Company, with-
in the scope and coverage of said policy."

22 Nowhere within the complaint is it stated that appellee,
23 Government Employees Insurance Company, even insured the
24 vehicle owned by Nita S. Vela nor is a cause of action stated
25 against appellee under such policy.

26 Even if the court were to determine that an issue of

fact remains concerning recovery under the policy covering Mrs. Vela's automobile, which issue is improbable in view of the guest statute in the Vehicle Code of Guam, the court was justified in granting the motion for summary judgment so far as it dismisses the action against Government Employees Insurance Company under its policy No. 216-27-25 issued to Charles L. Hofer only. Since that is the only policy referred to in the pleadings, the court properly granted the motion without prejudice to appellants' rights to sue appellee on any other policy issued by it.

"The object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial so that only the latter may subject a suitor to bear the burden of trial." Richard v. Credit Suisse (1926) 242 NY 346, 152 N.E. 110, 111, 45 A.L.R. 1041. Reed Research Inc. v. Schumer Company (CA 1957) 243 F. 2d 602. 605.

II. THE TRIAL COURT PROPERLY APPLIED THE PROVISIONS OF SECTION 433354 OF THE GOVERNMENT CODE OF GUAM IN THIS INSTANCE.

A. Appellant's brief is misdirected to the real issues in this case.

Appellant spends two pages of his brief noting that when a statute has been copied from another jurisdiction in the absence of specific statutory exception, the interpretation and construction of the court of last resort in the state from which the statute is copied is controlling, and the statute incorporates the prior case law of the other state.

1 Having conclusively proved his point, he then argues
2 that the District Court of Guam should be reversed without
3 having related his argument to anything which the Court
4 apparently did wrong. Where has appellant in point 2 of his
5 argument stated that the court failed to apply the case law
6 of Louisiana to the facts of this case?

7 It appears that the aforementioned argument must be
8 held in abeyance until finally resolved in point 3 of the
9 appellant's brief. It is, therefore, appellee's intention
10 to incorporate point 3 into point 2 and thereby organize a
11 coherent answer to the argument.

12 B. The Territory of Guam has no survival statute.

13 In footnote No. 1 of this court's opinion in Capital
14 Insurance and Surety Company v. Kelley, supra, this court
15 relates the history of the Guam law concerning survival of
16 claims upon the death of a tortfeasor and shows that claims
17 of the type we are dealing with here do not survive the death
18 of a tortfeasor.

19 C. Upon a close analysis of the relevant code,
20 provisions and case law from this court, one
21 must conclude the trial court has acted
22 properly.

23 Section 43354 of the Government Code of Guam, which
24 appellant alleges was misapplied and misconstrued, states:

25 "On any policy of liability insurance, the
26 insured person or his heirs or representa-
tives shall have a right of direct action

1 against the insurer within the terms and
2 limits of the policy. . ."
3 (Emphasis added).

4 The terms and limits of the policy in the instant
5 case are that appellee agrees "to pay on behalf of the in-
6 insured all sums which the insured shall become legally obliga-
7 ted to pay as damages. . ." As such, coverage is identical
8 to the policy in Capital Insurance and Surety Company v.
9 Kelley, supra, decided on May 18, 1966 by the Ninth Circuit
0 Court of Appeals on an appeal from a decision of the Federal
1 District Court of Guam. That case presented the identical
2 question we have here and is controlling.

3 In that case, a head-on collision resulted in death
4 to the defendant's insured. In arguing that Section 43354
5 of the Government Code of Guam provided for liability in-
6 spite of the fact that the action was abated as to the in-
7 sured and his estate, plaintiff-appellee attempted to show
8 that one section of Guam's Financial Responsibility Law in-
9 tended to make the insurer continue to be liable under the
0 policy inspite of the fact that the insured had died. In
1 reversing the trial court, this court held:

2 "It is not our function, in a case such as
3 this, to establish a policy which is claimed
4 to be in the interest of the people of Guam.
5 The policy, good or bad, is already fixed
6 by the action or inaction of the legislative
7 bodies properly empowered to enact measures
8 reflecting the will of their constituancies.
9 Here, the legislature has decreed that a
0 victim ' . . shall have a right of direct
1 action against the insurer within the terms
2 and limits of the policy. . .' The insurance

1 contract under consideration provided that
2 the appellant would indemnify the insured
3 for all sums which he shall become legally
4 obligated to pay as damage because of
5 bodily injury, including death at any time
6 resulting therefrom. . ."
7 (Emphasis added).

8 On page 10 of their brief, appellants cite Lumbermen's
9 Mutual Casualty Company v. Elbert, 348 U.S. 48, 99 L.Ed. 59,
0 75 S.C. 151. It is interesting to note that in the quoted
1 part of the opinion and appearing on page 11 of their brief,
2 the following language is used:

3 "While either type of action encompasses
4 proof of the tortfeasor's negligence, in
5 the separate suit against the insurer
6 plaintiff must also establish liability
7 under the policy."

8 Appellants refer to the unreported opinion of Kelley
9 v. Capital Insurance and Surety Company, Civil Case No. 6-65,
0 District Court of Guam, which was overruled by this court.
1 They cite the case of Davies v. Consolidated Underwriters,
2 6 So. 2d 351 (S.C. Louisiana 1942) in which the court held
3 that an insurer may not avail himself of the defense of
4 bankruptcy of his insured and, therefore, by implication,
5 that a direct action statute creates a cause of action against
6 the insurer which is separate and independent from the cause
7 of action against the insured insofar as defenses which are
8 personal to the insured may not be raised by the insurer.
9 To the same effect are the cases of McHenry v. American
0 Employees Insurance Company (1944) 18 So. 2d 656; Rome v.
1 Lancashire Indemnity Company of America, 169 So. 132.

1 The McHenry action involved a suit brought by the
2 husband against the wife's employer's insurance company in
3 an action where the husband was injured due to the wife's
4 negligence in driving her employer's car within the scope of
5 her employment. The court there held that the insurer could
6 not raise any personal defenses which the wife might have
7 been able to raise to defeat recovery by the husband. The
8 Rome case involved an action for wrongful death against the
9 insurer of a municipal corporation. There, the insurer was
0 not allowed to take advantage of the defense of governmental
1 immunity which was held personal to the insured. In that
2 case, there is a well-reasoned and strong dissent by Justice
3 Janvier.

4 These three cases cited by appellants are distinguish-
5 able in that all involve personal defenses releasing the in-
6 sureds from liability under a cause of action which, but for
7 the defenses, would be absolute. In the instant case, the
8 action itself abated. It is clear that abatement of an
9 action because of death of a party is not a personal defense
0 but rather is a statement of public policy designed to pre-
1 vent fraudulent claims against a deceased person's estate.
2 The policy behind this was well-reasoned in this court's
3 opinion of Capital Insurance and Surety Company v. Kelley,
4 supra:

5 "There was a strongly valid reason for Guam's
6 action in authorizing a direct proceeding
7 against the insurer of an automobile operating

1 upon Guam's roadways. It is well known
2 that the population of the territory,
3 military personnel and others has been
4 unusually transient in its nature. Ob-
5 viously, it was believed that an insurer
6 of an automobile should not escape a just
7 obligation because of the removal of its
8 insured from the territory and the conse-
9 quent difficulty of or impossibility of
10 subjecting the insured himself to the
11 jurisdiction, impersona, of the courts of
12 Guam. It is hardly to be questioned, how-
13 ever, that the legislature contemplated
14 that an insurer sued in a direct action
15 might encounter no insurmountable obstacle
16 in presenting its insured's testimony either
17 in deposition form or by production of the
18 witness personally.

19 "In analyzing the case at hand, different
20 considerations of policy are apparent. An
21 alleged tortfeasor who is deceased may have
22 been the only witness to events which might
23 fairly exculpate him from legal responsibility.
24 The rule that a tort action against him abates
25 with his death was predicated upon the belief
26 that public policy would be best served by
27 avoiding the possibility that heirs suffer
28 injustice because his death foreclosed the
29 opportunity for successful defense."

30 Again referring to this court's opinion in Capital
31 Insurance and Surety Company v. Kelley, supra, this court
32 considered the Louisiana cases cited by appellant, found
33 the interpretations somewhat uncertain so far as the issue
34 in the present case is concerned, and chose to rest its
35 decision on other well-reasoned authorities.

36 The Court of Appeals for the Fifth Circuit in Degelos
37 v. Fidelity and Casualty Company, 313 F. 2d 809 (1963),
38 interpreted the Louisiana statute as meaning:

39 "Under the direct action statute, the case

1 may proceed against the insurer, that
2 liability depends on legal liability of
3 the insured. Whether, as the act permits,
4 the insured is joined with the insurer, the
5 standard for recovery is identical."
6 313 F. 2d at 815.

7 Therefore, in view of the cases cited above, and
8 particularly the decision of this court in the case of
9 Capital Insurance and Surety Company v. Kelley, supra, which
10 presented identical issues to the court, it is apparent
11 that the District Court of Guam properly granted the motion
12 for summary judgment.

13 CONCLUSION

14 In the complaint to this cause, appellants referred
15 solely to insurance policy No. 216-27-25 issued to Charles L.
16 Hofer and effective on August 12, 1965. It is clear that,
17 based on the recent decision of this court in Capital Insur-
18 ance and Surety Company v. Kelley, supra, which properly
19 construed Section 43354 of the Government Code of Guam to
20 provide for direct action against an insurer in accordance
21 with the terms and limits of the policy of insurance; to-wit:
22 only providing for indemnity to the insured for such losses
23 as he may become legally obligated to pay as damages and,
24 in view of the law of Guam by which no action in tort sur-
25 vives the death of the alleged tortfeasor, the District
26 Court of Guam correctly granted the motion for summary
judgment and dismissed this action. Therefore, the court's
judgment should be affirmed.

1 Dated, San Francisco, California,

2 October 27, 1967.

3 Respectfully submitted,

4 E. S. TERLAGE

5 SEDGWICK, DETERT, MORAN & ARNOLD

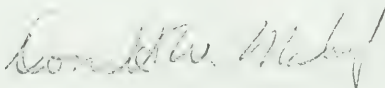
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9
10
11 CERTIFICATE

12 I certify that in connection with the preparation of
13 this brief, I have examined Rules 18, 19 and 39 of the
14 United States Court of Appeals for the Ninth Circuit, and
15 that, in my opinion, the foregoing brief is in full compli-
16 ance with those rules.

17 

18 DONALD W. MALOUF

19 Attorney for Appellee

No. 21758
IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NITA S. VELA, CHRISTIE L. VELA, a
minor, by and through RUDOLFO R.
VELA, her father and next friend,
ANDREA LASSEN, a minor, by and
through JACK G. LASSEN, her father
and next friend, and KATHRYN ANDERSON,
a minor, by and through ROY ANDERSON,
her father and next friend,

Appellants,

vs.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,
c/o GUAM INSURANCE ADJUSTERS,

Appellee.

On Appeal from the District Court of Guam

APPELLEE'S BRIEF FOR THE PURPOSE OF CLARIFYING
THE APPLICABILITY OF GUAM PUBLIC LAW NO. 8-115

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No. 21758
IN THE
UNITED STATES COURT OF APPEALS
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NITA S. VELA, et al,

Appellants,

vs.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,
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Appellee.

On Appeal from the District Court of Guam

APPELLEE'S BRIEF FOR THE PURPOSE OF CLARIFYING
THE APPLICABILITY OF GUAM PUBLIC LAW NO. 8-115

APPELLANTS' POSITION

Appellants argue that Section 956 of the Civil Code of Guam must be given retroactive effect and must, therefore, apply to the accident which forms the basis of this claim.

If such were the case, then, under the Direct Action Statute embodied in Section 43354 of the Government Code of Guam, plaintiff appellants would have a direct right of action against the carrier of the deceased, whose act allegedly was the cause of the injuries sustained.

The basis of appellants' contention is that prior to the passage of Civil Code Section 956 there was no statute in Guam providing for the abatement of a cause of action at the death of the wrong-doer. Further, appellants contend tha

any such rule of abatement is derived from the British Common Law which has never been enforced in Guam.

ARGUMENT

Appellants are mistaken in their interpretation of Guam Law.

The history of the law of Guam, from the time it came under the influence of the United States, is well set forth in the case of United States v. Johnson, (1950) 181 F. 2d 577. There, the plaintiff sued the United States under a theory of respondeat superior for injuries sustained while riding in a truck owned by the United States Navy and driven by a member of the Armed Forces. The court there stated that the island was acquired by the United States under the terms of a treaty following the Spanish-American War, and it was placed under the control of the Navy and of the Secretary of the Navy. By executive order of the Naval Government of Guam the Guam Codes were promulgated on December 28, 1933. These Codes were copied from the Codes of California. The court continued:

"When the appropriate authority adopted from California a code of laws designed to replace the original part Spanish law, it might be inferred that such codified rules as that of respondeat superior were intended to have the same significance and scope as they had been given by the Supreme Court of the State from which the Code was taken."
(emphasis added)

Section 377 of the Code of Civil Procedure of Guam was enacted in 1933 as part of the original Codes of Guam.

1 That section provides as follows:

2 "When the death of a person not being a minor
3 is caused by the wrongful act or neglect of
4 another, his heirs or personal representatives
5 may maintain an action for damages against the
6 person causing the death, or if such person be
employed by another person who is responsible
for his conduct then also against such other
person..." (emphasis added)

7 In the preliminary provisions of the Code of Civil
8 Procedure of Guam, Section 18 provides:

9 "No law, or rule is continued in force
10 because it is consistent with the provisions
11 of this code on the same subject; but in all
12 cases provided for by this code, all laws,
13 and rules heretofore enforced in this island,
14 whether consistent or not with the provisions
of this code, unless expressly continued in
force by it, are repealed and abrogated.
This repeal or abrogation does not revive
any former law heretofore repealed, nor does
it affect any right already existing or
accrued..."

15 By this it is clear that the Guam legislature intended the
16 provisions of the Code to be controlling and to replace all
17 prior law within its scope. This is further augmented by
18 Section 4 of the Preliminary Provisions of the Code of Civil
19 Procedure of Guam whereby it is expressly provided that:

20 "This code establishes the law of this
21 Island respecting the subjects to which
it relates..."

22 Since, therefore, Code of Civil Procedure Section 377
23 became the law of Guam in 1933 and continued in effect until
24 the passage of Civil Code Section 956 in 1966, it is clear
25 that it is controlling on the issues here before the court in
26 the issues fall within its scope.

1 The provisions of Code of Civil Procedure
2 Section 377 are applicable to the facts of
3 this case.

4 In Footnote 1 to this court's opinion in Capital
5 Insurance & Surety Co., Inc. v. Kelly, (1966) 361 F. 2d 567,
6 this court noted:

7 "In its written opinion, the District Court observed:
8 'The Guam Codes were originally adopted from California
9 in 1933, at which time the California courts held
10 that torts of this kind did not survive the death
11 of the tort feisor. When Guam took the California
12 Codes it took the construction placed upon such
13 Codes by the California courts, United States v.
14 Johnson, 181 F. 2d 577. McLellan v. Automobile
15 Ins. Co. of Hartford, Conn., 80 F. 2d 344 (9th
16 Cir. 1935), was a case which arose in Arizona but
17 so many California cases are cited as to make it
18 abundantly clear that survival did not exist.
19 The plaintiffs herein do not contend to the
20 contrary.'"

21 The District Court continued, as further cited in
22 footnote 1 above, that in 1946 the California court, in
23 Hunt v. Autier, 28 C. 2d 288, 169 P. 2d 913, determined that
24 a claim for property damage did not abate with the death of
25 the tort feisor. This was widely criticized as a usurpation
26 of the legislative function. Finally, in 1949, California
27 passed Civil Code Section 956 to the effect that the death
28 of the tort feisor did not cause the action to be abated.

29 Although not cited in its decision, the crucial
30 California case on the question at issue is Clark v. Goodwin,
31 (1915) 170 Cal. 527, 150 P. 357, 358, LRA 1916A, 1142. That
32 court held:

33 "The authorities are uniform in supporting
34 the conclusion we have reached, that under

1 statutes as ours the cause of action for
2 damages for the death of her husband, given
3 plaintiff by Section 377 of the Code of Civil
4 Procedure, abated with the death of the alleged
wrongdoer prior to the action brought, and
that such action cannot be maintained against
his personal representative." (id at 531)

5 Although couched in terms of falling back onto the
6 common law since the statute did not create a new right,
7 nonetheless, the interpretation of that statute as given by
8 the court in Clark v. Goodwin, supra, is to the effect that
9 there was no right to sue the representative of the deceased.
10 It is that interpretation which the legislature of Guam
11 adopted with the passage of its own Section 377 as borrowed
12 from California.

13 Furthermore, this court has determined the issue in its
14 opinions in United States v. Johnson, supra, and Capital
15 Insurance & Surety Co., Inc., v. Kelly, supra, where the
16 court stated, at page 570:

17 "The rule that a tort action against him abates
18 with his death was predicated upon the belief
19 that public policy would best be served by
20 avoiding the possibility that heirs suffer
21 injustice because death foreclosed the
22 opportunity for successful defense."

23 Section 377 of the Code of Civil Procedure was given a
24 dual significance in California by the holding in Clark v.
25 Goodwin, supra. On the one hand it enabled heirs to sue for
26 damages for the death of a decedent, and on the other hand it
provided that such action must be brought against the person
causing the death. Those latter words were construed as
clearly indicating an intention not to allow an action to

1 to be brought against the representatives of the deceased
2 tort feasor.

3 By accepting the interpretation of the California
4 courts, Guam also accepted the common law rule about abate-
5 ment of actions on the death of the tort feasor. To hold
6 otherwise would be tantamount to a declaration by the Guam
7 legislature of intent to borrow an entire statute, complete
8 with wording which has been clearly and precisely inter-
9 preted, while rejecting that interpretation. It is
10 inconceivable that the legislature could have so intended
11 when they could as just as easily reworded the statute to
12 read that the action could be brought against the person or
13 his heirs or representatives.

14 It is, therefore, submitted that the rule of law in
15 Guam prior to 1966 was that an action abated upon the death
16 of the tort feasor.

17 Public Law 8-115 is not retroactive.
18

19 Appellants concede that Civil Code Section 956 was
20 borrowed from California Civil Code Section 956. As such, it
21 is also borrowed subject to the interpretation given it by
22 the California courts.

23 In Cort v. Steen, (1950) 36 C. 2d 437, a case cited by
24 appellants, an action in negligence was brought by a passenger
25 in the decedent's automobile after the driver had died. The
26 court stated that prior to 1949 there was no provision under

1 the law of this state for the survival of actions to recover
2 for personal injury. The question of the new statute's
3 retroactivity was determined as follows:

4 "Courts have treated the phrase 'actio personalis
5 moritur cum persona' as referring not merely to
6 the remedy, but to the right or cause of action
7 itself...Under the doctrine the abatement of the
8 action by the death of the injured person through
9 the tort feisor's act or otherwise, or by the
10 death of the tort feisor, was deemed to abate
11 the wrong as well...[thus] a survival statute
12 was deemed to create a right or cause of action
13 rather than to continue an existing right or
14 revive or extend a remedy theretofore accrued for
15 the redress of an existing wrong."

16
17 It is clear, therefore, that since the California
18 interpretation of the new section is binding upon the Guam
19 court, the effect of this section is not retroactive and may
20 not be used to give the plaintiffs a cause of action which
21 they did not have at the time of the accident.
22

23 CONCLUSION

24 It is submitted that Public Law 8-115, which added
25 Section 956 to the Civil Code of Guam, is not applicable to
26 the action before the court since it was not passed until
three months after the accident which is the subject of this
lawsuit.

Dated, San Francisco, California,

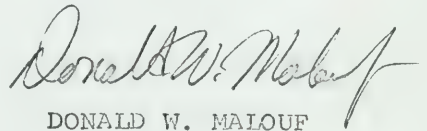
April 5, 1968.

Respectfully submitted,
E.S. TERLAGE
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1
2 CERTIFICATE
3

4 I certify that in connection with the preparation of
5 this brief, I have examined Rules 18, 19 and 39 of the
6 United States Court of Appeals for the Ninth Circuit, and
7 that, in my opinion, the foregoing brief is in full
8 compliance with those rules.
9

10 

11 DONALD W. MALOUF

12 Attorney for Appellee
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N O. 21759 /

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT CLAYTON BUICK,

Appellant,

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UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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FILED

FEB 22 1968

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MAR 4 1968

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant, Robert Clayton Buick (hereinafter referred to as "Buick"), was indicted by the Federal Grand Jury for the Southern District of California on April 20, 1966 [C. T. 1]. ^{1/} The indictment contained 22 counts alleging that on specific dates from July 29, 1961, and continuing to on or about February 7, 1966, Buick did rob 22 Federally insured savings and loan associations in violation of Title 18, United States Code, Section 2113(a) and (d)

^{1/} C. T. refers to Clerk's Transcript.

[C. T. 1-22].

On April 25, 1966, Buick was arraigned in Los Angeles, California, and the matter was continued for entry of plea [C. T. 23]. On May 9, 1966, Buick entered a plea of not guilty to all counts of the indictment [C. T. 24]. On June 20, 1966, Buick moved to sever counts for trial and it was ordered that the trial would commence on September 26, 1966, on Counts 19, 20, 21 and 22 [C. T. 32]. On July 1, 1966, a psychiatric hearing was held and the court found that Buick was presently sane and able to proceed in the case and properly assist in his defense [C. T. 37]. On September 12, 1966, the court continued the trial to October 11, 1966, and granted Buick's motion to appear in pro per with the assistance of previous counsel Mrs. Root, and appointed two additional psychiatrists to examine Buick [C. T. 43]. On September 23, 1966, the court again found Buick sane and able to proceed to trial. In addition, Buick's request to be relieved as acting in pro per and have Mrs. Root reinstated as his attorney at trial was granted [C. T. 55].

The trial by jury commenced on October 11, 1966, before the Honorable Irving Hill, United States District Judge [C. T. 87]. On October 17, 1966, the court held a hearing out of the presence of the jury on Buick's motion to suppress evidence. After presenting evidence and hearing argument the court denied Buick's motion to suppress evidence [C. T. 95]. On October 19, 1966, the jury returned a verdict finding Buick guilty of the charges contained in Counts 20, 21 and 22 [C. T. 97].

On December 6, 1966, the court considered a motion filed by Buick as being a motion for a new trial and it was denied [C. T. 110]. On December 9, 1966, the defendant was sentenced to the custody of the Attorney General for a period of 20 years for the offense charged in Count 21, 20 years for Count 22 and 20 years for Count 23, said sentences to run concurrently and the sentence being pursuant to the provisions of Title 18, United States Code, Section 4208(a)(2) [C. T. 117]. On December 19, 1966, the court filed an order denying Buick's motion entitled Petition for a Hearing to Vacate Judgment of Conviction and To Set Aside Sentence of Robbery of a Savings and Loan Association; Use of a Dangerous Weapon [C. T. 119-120].

On December 16, 1966, a notice of appeal was filed by counsel for Buick [C. T. 128].

The jurisdiction of the District Court was based upon Section 2113(a) and (d) of Title 18, United States Code. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

SPECIFICATION OF ERRORS

1. Was the appellant deprived of any rights by having the wife of an FBI agent allegedly report pertinent testimony to the various witnesses in the witness room, contrary to the court's order?

2. That appellant was arrested without probable cause and thereafter appellant's constitutional rights were violated by an unreasonable search and seizure.

III

STATEMENT OF FACTS

The original indictment returned against Buick alleged that he had committed 22 violations of Title 18, United States Code, Section 2113(a) and (d). Pursuant to the motion by Buick, the trial court severed the first 18 counts from the last four, and proceeded to trial on Counts 19, 20, 21 and 22 [C. T. 32]. At the trial of the case the United States did not present any evidence on the crime alleged in Count 19, and proceeded to prove only Counts 20, 21 and 22.

The Government first presented evidence that Mission Savings and Loan Association, located in Santa Ana, California, was robbed on October 26, 1965 [R. T. 126]. ^{2/} Mr. Daniel Backus testified that he observed Buick in the act of robbing the chief accountant and teller of Mission Savings and Loan Association [R. T. 130-131]. Mr. Crabtree, the chief accountant, testified that he saw Buick hold a small nickle or silver plated type gun on him and the teller and take money [R. T. 160 and 171]. Mrs. Denise Quillin testified that Buick approached her, displayed a Derringer

^{2/} R. T. refers to Reporter's Transcript.

type hand gun and she heard Buick state "Make it fast" in demanding the money [R. T. 189, 192-193 and 196]. Two additional witnesses, Mr. and Mrs. Hoffman, testified that they observed Buick exit from Mission Savings and Loan, pass through the parking lot and enter a green colored station wagon [R. T. 223-225 and 269-270].

The Government next presented evidence establishing that Buick robbed the Metropolitan Savings and Loan Association located in Long Beach, California, on January 31, 1966. The testimony presented in this case consisted of employees of the savings and loan association, who identified Buick as the individual who entered their association with a chrome Derringer type hand gun and demanded money [R. T. 329, 383 and 483].

The third and final crime on which evidence was presented by the Government, was the robbery of the Pacific Savings and Loan Association, located at Monterey Park, California, February 7, 1966. The Government presented testimony of three employees of Pacific Savings and Loan Association, to show that Buick was the individual who entered the association and used a small chrome Derringer type weapon in committing the robbery [R. T. 428, 543, 580, 607]. In addition, Mr. Kendrick, a retired police officer, testified that he saw Buick run from the scene of the crime and enter a car and speed away. Mr. Kendrick followed Buick for a considerable distance at high speeds until Buick pulled off a side road and stopped. At this time a brief struggle ensued in which Buick made good his escape. Mr. Kendrick wrote down the license

number of the automobile used by Buick, and gave this to the Federal Bureau of Investigation [R. T. 624-629]. The Government presented the official records of the Department of Motor Vehicles for the State of California, to establish that the last known registrant of the above mentioned license plate number recorded by Mr. Kendrick, was Robert Clayton Buick [R. T. 747-749].

In addition to the above mentioned eyewitness testimony the Government submitted in evidence a small chrome Derringer .38 pistol. On October 5, 1966, counsel for Buick filed a motion for the suppression of evidence with supporting points and authorities [C. T. 56-58]. On October 14, 1966, a stipulation was signed by Buick agreeing that the Government's Exhibit No. 1 for the motion to suppress was a copy of the memorandum referred to in the affidavit of Patrolman Kelly Whitehead, and in the testimony of Deputy Sheriff Ingram concerning the motion to suppress, and this was signed by respective counsel for the Government and the defendant [C. T. 61]. On October 7, 1966, Buick filed a declaration under penalty of perjury, setting forth the facts in support of the motion to suppress [C. T. 68-69]. In opposition to Buick's motion, the United States filed the affidavit of Gary Ingram, Deputy Sheriff of Reese County, Texas [C. T. 70-72], and the affidavit of Highway Patrolman Kelly Whitehead [C. T. 73-75]. All affidavits were admitted into evidence for the hearing on the Motion to Suppress [R. T. 82-83]. On October 11, 1966, a hearing was conducted out of the presence of the jury, and the court held that the evidence was lawfully seized and, therefore, denied the defendant's motion to

suppress the evidence [R. T. 115].

The facts concerning the arrest were that on April 21, 1966, Buick was travelling outside of Pecos, Texas, in a 1961 Karmann Ghia, with 1965 Florida license plates. Patrolman Whitehead, with Deputy Sheriff Ingram passed Buick's automobile and proceeded to pull off to the side of the road, exit their patrol car and flag down Buick. Buick got out of the car on the driver's side and Patrolman Whitehead asked for the automobile registration and Buick's driver's license. Buick produced a 1966 Florida license plate and registration in the name of Mark Anthony Dansereau. Buick stated that he did not know where his driver's license was but thought it was in a brief case in the car. Buick removed a brief case and placed it on the hood of the car and opened it, but was unable to find a driver's license in the brief case. At this time Deputy Sheriff Ingram observed in the open brief case a chrome plated Derringer pistol, a quantity of money and a gold identification bracelet. Deputy Sheriff Ingram testified that he was aware of a wanted poster for a Robert C. Buick for bank robbery and was trying to recall where he had seen Buick's face. At that time Deputy Sheriff Ingram reached into the brief case, removed the Derringer pistol and the identification bracelet. Deputy Sheriff Ingram then radioed to his office in Pecos, Texas, and determined that there was a fugitive warrant outstanding for Robert Clayton Buick [C. T. 70-75; R. T. 84-107, 113-115]. It must be noted that the only item utilized in the trial was the Derringer pistol and the bullets contained therein [R. T. 81].

Buick's oral testimony and his affidavit constitute nearly all of the statement of facts contained in appellant's brief. Buick's position was that Deputy Sheriff Ingram and Patrolman Whitehead forcibly abused him at the time of stopping his car, they took the brief case from his car, opened it without his consent, and made a search without any probable cause [R. T. 916-929]. At the time of sentencing the court specifically commented upon the fact that the testimony of Buick on the witness stand was less than candid [R. T. 1115]. At this time Buick was sentenced to the custody of the Attorney General for a term of 20 years concurrently on each count, pursuant to the provisions for parole under Title 18, United States Code, Section 4208(a)(2) [R. T. 1115].

IV

ARGUMENT

- A. THE RECORD IS VOID OF ANY EVIDENCE TO SUBSTANTIATE APPELLANT'S CONTENTION THAT THE ORDER CONCERNING THE EXCLUSION OF WITNESSES WAS VIOLATED.
-

In considering appellant's contention that a conspiracy existed to transmit testimony to prospective witnesses, this Court should consider only the evidence in the record. In construing the record of a trial on appeal, the evidence should be considered in a light favorable to the appellee. See Davison v. United States, 368 F.2d 505 (9 Cir. 1966), at 507, n. 3.

A review of pages 842 to 845 of the Reporter's Transcript of the trial will show that appellant's contention is totally without merit. Appellant's counsel, Mrs. Gladys Towles Root, said she was informed that Mrs. Ahders had been observed going into the witness room, where prospective witnesses were waiting. As Mrs. Root said: " . . . I am again making no accusations. . . . It is my opinion that there should be at least an admonition." [R. T. 843] Mrs. Root further stated: "Now, I could be absolutely incorrect. But in the future, so that we do not have this again, if we can have an admonition. . . ." [R. T. 844] The record clearly establishes that counsel for appellant was not at all certain what had transpired in the witness room and merely sought an admonition to prevent any future conversations. The trial court gave the admonition requested, and it was acknowledged by appellant's counsel, who thanked the trial judge [R. T. 845].

From the foregoing facts, it is respectfully submitted that appellant's contention is totally without merit. As counsel for appellant so stated to the trial court, she was basing her allegation upon hearsay, and it was unknown what in fact had happened and that no accusation was being made [R. T. 842-843]. After reviewing the record of this case, it is shocking that appellant can allege this contention of a conspiracy to violate appellant's rights in violation of the witness exclusion order. As the reviewing courts have frequently stated: "We do not presume error; we require the appellant to demonstrate it." Sica v. United States, 325 F.2d 831 (9 Cir. 1963), at 836, cert. denied 376 U.S. 952.

B. ASSUMING A VIOLATION OF THE
 WITNESS EXCLUSION ORDER, THE
 FAILURE OF APPELLANT TO SHOW
 ANY PREJUDICE RESULTS IN HARM-
 LESS ERROR.

While the Government maintains that the record is void of any evidence to substantiate appellant's contention, there exists an additional ground for rejecting this contention. The control of witnesses and their exclusion during a trial is left to the sound discretion of the trial court. See United States v. Bostic, 327 F.2d 983 (6 Cir. 1964). In fact, even if a violation of an exclusion order is established, it is up to the sound discretion of the trial court to determine what measures are necessary to rectify the situation. See Spindler v. United States, 336 F.2d 678 (9 Cir. 1964). Appellant has failed to show any abuse of discretion and in fact appellant obtained the admonition of Mrs. Ahders as requested.

The courts have frequently held that in reviewing the propriety of a refusal to exclude witnesses, an appellant must show that he was prejudiced. Kaufman v. United States, 163 F.2d 404 (6 Cir. 1947), cert. denied 333 U.S. 857; Mitchell v. United States, 126 F.2d 550 (10 Cir. 1942), cert. denied 316 U.S. 702, reh. denied 324 U.S. 887.

Appellant has failed to indicate in any manner how he was prejudiced by Mrs. Ahders having gone to the witness room after being in court. During the trial appellant must have believed this fact to be so insignificant that no effort was made to show what happened or how appellant may have been prejudiced. As previously

stated it is incumbent upon an appellant to establish error, it will not be presumed. Sica v. United States, supra.

C. THE DERRINGER PISTOL WAS PROPERLY ADMITTED INTO EVIDENCE.

1. Appellant's Contention That the Gun Was Obtained Pursuant to an Unreasonable Search and Seizure is Based Upon a Misstatement of the Evidence.
-

In appealing a ruling on a motion to suppress, the evidence is to be construed in a light favorable to the Government. Blefare v. United States, 362 F.2d 870 (9 Cir. 1966). In appellant's statement of the case (Appellant's Opening Brief, pp. 4-9), it is alleged that Officer Whitehead and Deputy Ingram forcibly removed the brief case from the car without any right or consent and opened the brief case that contained the gun, identification bracelet and currency (Appellant's Opening Brief, pp. 8-9). This statement of fact is Buick's version of what happened [R. T. 916-929]. It must also be noted that the trial judge specifically commented that Buick had been less than candid while testifying [R. T. 1115].

The two arresting officers (Officer Whitehead and Deputy Sheriff Ingram), presented testimony concerning the facts of the arrest that are in direct conflict with Buick. All parties agree that Buick was flagged down in a 1961 Karmann Ghia with 1965 Florida license plates. At this time Officer Whitehead was informed that the 1966 Florida license plates should be displayed [C. T. 73-

74]. It was later clarified that the Governor of Florida had issued an order enabling automobile owners to continue using their 1965 license plates until April 20, 1966, a date after Buick was arrested [R. T. 88-89]. However, Officer Whitehead had not been informed of the legality of the 1965 Florida license plate and believed it to be a violation [C. T. 73-74].

After Buick stopped he was asked to display his driver's license. Buick made a search for his driver's license and brought his brief case out of the car [C. T. 71, 74; R. T. 84-85]. Buick opened the brief case to search for his license and Deputy Sheriff Ingram observed a chrome plated Derringer type gun, a gold identification bracelet and an amount of loose currency [C. T. 71-74; R. T. 84-85]. While searching for his license, Buick used a false name and identified himself as Mark Anthony Dansereau. Approximately one hour earlier Deputy Sheriff Ingram had viewed a wanted poster for a man named Buick. After seeing the name on the identification bracelet, Deputy Sheriff Ingram radioed his office, confirmed the fact that Buick was a fugitive, and took him to jail [C. T. 71-74].

Contrary to appellant's argument, the arresting officers did not take the brief case from the car and open it without any authority. It is respectfully submitted that the alleged facts described by appellant are not the true facts as developed in the trial and should be disregarded.

2. The Gun Admitted Into Evidence
 Against Appellant Was Not the
 Product of An Illegal Search and
 Seizure.

It is conceded that at the time Buick's car was stopped for an apparent vehicle violation, the officers had no right to search the vehicle and the brief case. However, the officers did have a right to inspect Buick's driver's license. See Vernon's Texas Statutes, Article 6687(b), Sec. 2.

The facts of this case also established a second basis for the arrest. Under Article 6701(d), Sec. 153, Vernon's Texas Statutes, Officer Whitehead was authorized to place any person under arrest who was caught operating a motor vehicle without a valid driver's license. Pursuant to making this arrest, the officers were clearly entitled to take possession of the gun which was in plain sight, in order to insure their own protection. ^{3/} Even a reasonable search incident to the arrest would make the gun admissible. However, in the present case there was not any search.

Appellant contends that the arrest occurred when Buick's car was stopped (Appellant's Opening Brief, p. 11). The Government does not agree with this position. At that time Officer Whitehead was investigating Buick for driving with an invalid license

^{3/} Upon viewing the gun Deputy Sheriff Ingram was obligated to arrest Buick for having a pistol in his brief case, because it violated Texas Penal Code, Chapter 4, Article 483. Article 487 of Chapter 4 exposes Deputy Ingram to a possible fine for not arresting a person he sees carrying a pistol in a brief case.

plate. The Texas Highway Patrol memorandum clearly stated that the license plate on Buick's car was invalid [C. T. 73-75]. This memorandum was in error, but Officer Whitehead clearly had a reasonable basis for stopping Buick. The viewing of the gun, money, and identification bracelet, along with Buick's inability to produce a valid driver's license provided the basis for the arrest as well as Deputy Sheriff Ingram's recollection of the FBI wanted poster and confirmation of this fact [R. T. 70-72; 113-115].

In Busby v. United States, 296 F.2d 328 (9 Cir. 1961), a police officer observed an automobile that had a faulty light over the license plate. Another police officer arrived and the occupants were asked to step out of the automobile. When the automobile door was opened, the dome light illuminated the interior and one police officer observed a sawed-off shotgun lying in the back of the car. The court held that the admissibility of the evidence turned on the narrow question of when the arrest occurred. The court held that the arrest occurred after the sawed-off shotgun had been discovered.

The Busby case, ibid., followed the reasoning of the Supreme Court as set forth in Rios v. United States, 364 U.S. 253 (1960). In Rios, id., at 262, the court stated that the police could approach Rios for momentary interrogation, and if at that time the officers observed a package of narcotics, they would have probable cause to believe a felony was committed in their presence. Once having probable cause to make the arrest, the narcotics would be admissible evidence against Rios. The thrust of this view is that

there was no arrest until the narcotics were observed. This is precisely what happened to Buick in the present case. The pistol, identification bracelet and currency were observed while Buick was searching for his driver's license. Basically, there was no evidence obtained from Buick by any search. It is, therefore, respectfully submitted that appellant's contention of an illegal search and seizure is without merit.

V

CONCLUSION

For the reasons stated the Judgment of the District Court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

DENNIS E. KINNAIRD,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Dennis E. Kinnaird

DENNIS E. KINNAIRD

N O. 2 1 7 5 9

MAY 9 1968

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT CLAYTON BUICK,

Appellee,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S SUPPLEMENTAL BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

FILED

MAY 11 1968

WM. B. LUCK CLERK

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ROBERT L. BROSIO,
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N O. 2 1 7 5 9
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FOR THE NINTH CIRCUIT

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Appellee,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S SUPPLEMENTAL BRIEF

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N O. 2 1 7 5 9
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT CLAYTON BUICK,
Appellee,
vs.
UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S SUPPLEMENTAL BRIEF

I

SUPPLEMENTAL STATEMENT

Subsequent to the filing of appellee's brief, appellant, Robert Clayton Buick (hereinafter referred to as Buick), filed a brief entitled "Supplement Opening Brief of Appellant and Petition for Correction of Record". This brief was filed by appellant in pro se. The original opening brief for appellant was filed by his counsel of record, Mrs. Gladys Towles Root. Pursuant to a written directive from the Clerk of the Ninth Circuit, appellee files this supplemental brief in response to the contentions and allegations contained in appellant's supplemental opening brief. As to

appellant's petition for correction of record, an opposition to said petition is being answered under separate cover by appellee, entitled "Opposition to Petition for Correction of Record".

II

SUPPLEMENTED SPECIFICATIONS OF ERROR

In appellant's supplemental brief there are listed six allegations of error committed in the District Court, the majority of which were specifically raised in appellant's opening brief. For purposes of this response these allegations will be grouped together where they appear to relate to the same alleged error:

1. Appellant specifies in errors one and two that there exists error in the record because of the Government's allegedly knowing use of perjured testimony in the trial.

2. Appellant contends in errors three, four and five that the arrest and subsequent search of appellant was illegal and, therefore, any evidence derived from this search was improperly admitted into evidence.

3. Did the District Court commit error in allowing identification witness testimony when said witnesses had observed the defendant in a line-up where he had appeared without the presence of counsel?

III

ARGUMENT

- A. A REVIEW OF THE REPORTER'S TRANSCRIPT OF THIS TRIAL AND IN LIGHT OF THE SUBSEQUENT DISTRICT COURT'S REFUSAL TO CORRECT DENIAL OF APPELLANT'S MOTION TO CORRECT THE RECORD, THERE IS NO EVIDENCE THAT ANY PERJURY WAS UTILIZED IN THE CONVICTION OF BUICK, AND THIS CONTENTION IS FRIVOLOUS.
-

Appellant again reiterates the position raised in the opening brief that there was communication between the wife of an FBI agent in the courtroom and prospective witnesses. However, a review of the record of the trial (pp. 842-845), will clearly show that this question was presented to the District Court judge, that all relief sought was granted and that the appellant's allegation of the facts is without any justification. On appeal from a conviction the evidence is to be viewed in a light most favorable to the prosecution.

William v. United States, 273 F.2d 781, 799
(9th Cir. 1959), cert. denied
362 U. S. 951 (1960).

Based upon the evidence in this case the Court should dismiss appellant's contention as being frivolous.

A review of the order denying appellant's attempt to correct the record, attached to appellee's opposition filed herein, will show the factual allegations of appellant are incorrect.

Appellant also alleges that the arresting officers consciously committed perjury because of some alleged discrepancies in their testimony as to where appellant was located at the time of his arrest. A review of the pertinent facts in this case as set forth in the statement of facts of appellee's brief and of the arguments contained in the brief concerning the testimony of the arresting officers will show that no major discrepancy exists in the testimony, clearly not a sufficient discrepancy to justify an allegation of perjury. Again appellee respectfully submits that when the evidence is viewed in the light most favorable to the appellee that this contention must be considered totally without merit, frivolous and not submitted in good faith.

Appellant's contention that the Derringer pistol was obtained pursuant to an unreasonable search and seizure is based upon a misstatement of the evidence. It is respectfully submitted that appellant's allegations concerning the alleged illegal search and seizure are adequately answered in appellee's brief, pages 11 to 15.

Appellant has attempted to extend contention of illegally obtained evidence as submitted in the opening brief, to cover the photographs of the Buick station wagon used in the robberies and identified by Mr. Kendrick [R. T. 624-629]. The objection made to these exhibits is based upon the legality of the arrest and search [R. T. 296]. Appellee relies upon the validity of the arrest as submitted in appellee's brief on file herein, to show that the arrest and search was legal.

B. APPELLANT WAS NOT DEPRIVED
OF HIS SIXTH AMENDMENT RIGHT
TO COUNSEL BY BEING COMPELLED
TO PARTICIPATE IN A POLICE LINE-
UP WITHOUT THE ASSISTANCE OF
COUNSEL.

The three cases handed down on June 12, 1967, by the Supreme Court which held that an individual is entitled to have the aid of counsel at a line-up was specifically held not to be retro-active in its application. See United States v. Wade, 388 U.S. 218 (1967); United States v. Gilbert, 388 U.S. 263 (1967) and Stovall v. Denno, 388 U.S. 293 (1967). The present case was tried prior to these decisions, the trial commencing on October 11, 1966 [C. T. 87] and ending on October 19, 1966 [C. T. 97].

In Stovall v. Denno, id., at 296, the court specifically held:

"Our recent discussions of the retroactivity of other constitutional rules of criminal procedure make unnecessary any detailed treatment of that question here. (citing cases) These cases establish the principle that in criminal litigation concerning constitutional claims, 'the Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application'"

The court further stated that:

"Wade and Gilbert fashion exclusionary

rules to deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the absence of counsel."

The court held:

"It is, therefore, very clear that retroactive application of Wade and Gilbert 'would seriously disrupt the administration of our criminal laws.' . . . We conclude, therefore, that the Wade and Gilbert rules should not be made retroactive.

"We also conclude that, for these purposes, no distinction is justified between convictions now final, as in the instant case, and convictions at various stages of trial and direct review. We regard the factors of reliance and burden on the administration of justice as entitled to such overriding significance as to make that distinction unsupportable. We recognize that Wade and Gilbert are, therefore, the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules established in their cases." Id. at 300.

Appellant's argument contains numerous allegations of fact that are not supported by any reference to testimony contained in

the record. It is, therefore, respectfully submitted that any argument based upon the imagination of the appellant be disregarded by this Court. Further, in light of the specific holding in the Stovall v. Denno, *ibid* and the reasons given therein, it is respectfully submitted that appellant is not entitled to relief because of the absence of counsel.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

DENNIS E. KINNAIRD,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Dennis E. Kinnaird

DENNIS E. KINNAIRD

NO. 21759

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

8961 MAY 11 1968

ROBERT CLAYTON BUICK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

FILED

MAY 11 1968

WM. H. LUCK, CLERK

OPPOSITION TO PETITION
FOR CORRECTION OF RECORD
AND
POINTS AND AUTHORITIES
IN SUPPORT THEREOF

WM. MATTHEW BYRNE, JR.,
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N O. 2 1 7 5 9

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N O. 2 1 7 5 9

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT CLAYTON BUICK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

OPPOSITION TO PETITION
FOR CORRECTION OF RECORD

COMES NOW the United States of America, respondent herein, and requests this Honorable Court to deny petitioner's motion for a review of the order of the Honorable Irving Hill, United States District Judge, denying defendant's petition for correction of record for the following reason:

The order issued by the District Court is conclusive as it relates to the attempt to correct the transcript of the trial.

In support of said opposition respondent submits this opposition, the points and authorities attached hereto, and the affidavit and accompanying exhibits.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

DENNIS E. KINNAIRD,
Assistant U. S. Attorney

POINTS AND AUTHORITIES
IN SUPPORT OF
OPPOSITION TO PETITION
FOR CORRECTION OF RECORD

The question of correcting or modifying a record on appeal is controlled by the Federal Rules of Civil Procedure. The Federal Rules of Criminal Procedure, Rule 39(b)(1), provides:

"The rules and practice governing the preparation and form of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided in these rules."

Referring to Rule 75(h) of the Federal Rules of Civil Procedure, the question raised by petitioner is specifically covered. Rule 75(h) states:

"Power of Court to Correct or Modify Record.

". . . if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth."

The specific situation raised by petitioner herein was confronted by the Court of Appeals in Cox v. United States, 284 F.2d 704 (8 Cir. 1960). In the Cox case, ibid., appellant attempted to supplement the record by showing that a request was made in

court to examine the grand jury transcript. In support of said motion counsel for appellant filed an affidavit setting forth the testimony that was omitted from the Reporter's Transcript. This affidavit was corroborated by a second affidavit from counsel for a codefendant specifically recalling the same colloquy. The trial judge in his memorandum and order on this motion stated:

" . . . while he recalled an occasion when appellant's counsel approached the bench and made some request, . . . that he had no recollection of making or indicating any ruling in respect of the alleged request made by appellant's counsel, as set forth in his affidavit in support of motion. "

Utilizing this finding of fact the trial judge then refused to correct the record as requested by movant's counsel. The court held id. , at 711:

"The trial court's ruling on appellant's motion to correct the record is final and conclusive upon appeal. *Camps v. New York City Transit Authority*, *supra*, and *Century Indemnity Co. v. Arnold et al.* , 2 Cir. , 163 F.2d 531, certiorari denied 328 U.S. 854. . . . The trial court having stated that he has no recollection of appellant's alleged request, and under the applicable rule he being required to settle the record in case

of dispute as to what occurred, the attorney's affidavits as to what was said cannot now be considered on appeal. "

It is respectfully submitted that the affidavits and argument of petitioner be denied for the identical reasons given in the Cox case, supra. A review of the order of the Honorable Irving Hill will show, page 1, line 29:

" . . . the Court has no memory of the particular colloquy involved. The Court believes, however, from the context of the questioned colloquy that the reporter's transcript as written and submitted is correct. "

Furthermore, on page 2 the court specifically stated at line 5:

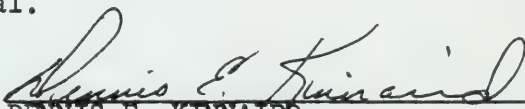
" . . . The court is further convinced and recalls that none of the colloquy which Defendant seeks to have inserted in the record, differing from the colloquy as shown in the reporter's transcript, occurred as alleged by Defendant and the other witnesses filing supporting affidavits. "

AFFIDAVIT OF DENNIS E. KINNAIRD

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

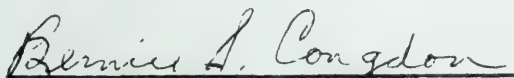
DENNIS E. KINNAIRD, being first duly sworn,
deposes and says:

That I am the Assistant United States Attorney
assigned the responsibility of representing the appellee
in the instant appeal. That attached hereto is Exhibit
A, and incorporated herein by this reference into this
affidavit is a true and correct copy of the Order of
the Honorable Irving Hill, denying petitioner's said
motion for a correction of the record of the trial in
the above entitled appeal.

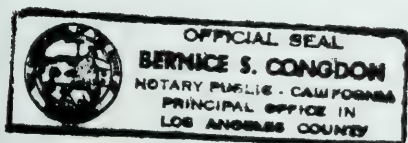

DENNIS E. KINNAIRD
Assistant U. S. Attorney

Affiant.

SUBSCRIBED AND SWORN TO BEFORE
ME this 30th day of April, 1968.


BERNICE S. CONGDON
Notary Public in and for said
County and State.

(SEAL) My commission expires: Jan. 25, 1969.



FILED

MAR 8 1968

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT CLAYTON EUICK,

Defendant.

No. 36082-III-CD

ORDER DENYING DEFENDANT'S
PETITION FOR CORRECTION
OF RECORD

Defendant filed under date of February 28, 1968, a document entitled "Petition for Correction of Record Hearing". Under date of February 29, 1968, the Court issued its Order to Defendant to furnish the detailed information concerning the particular corrections requested. Such information was furnished in a document entitled "Response to Order re Defendant's 'Petition For Correction of Record Hearing'" filed March 7, 1968. The Court has considered Defendant's said Petition, the said response, the affidavits filed in support of the Petition and the other documents and records of the within case.

IT IS ORDERED AS FOLLOWS:

1. As to the requested correction of the reporter's transcript, page 807, lines 19-20, the Court has no memory of the particular colloquy involved. The Court believes, however, from the content of the questioned colloquy that the reporter's transcript as written and submitted is correct.

1 2. As to the requested corrections in the reporter's
2 transcript page 245, lines 2-9, the Court recalls the colloquy
3 in question and is convinced that the reporter's transcript as
4 prepared and submitted contains a completely accurate report
5 of the colloquy in question. The court is further convinced
6 and recalls that none of the colloquy which Defendant seeks to
7 have inserted in the record, differing from the colloquy as
8 shown in the reporter's transcript, occurred as alleged by
9 Defendant and the other witnesses filing supporting affidavits.

10 IT IS ORDERED that each request for correction of the
11 reporter's transcript is denied.

12 IT IS FURTHER ORDERED that the Clerk serve copies of this
13 Order, by United States mail, on all parties to this action
14 this date.

15 DATED: March 8, 1968.
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17 /s/ IRVING HILL
18 Irving Hill, Judge
19 United States District Court
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EXHIBIT A

No. 21764

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

O'KEEFE ELECTRIC COMPANY, RESPONDENT

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,

General Counsel,

DOMINICK L. MANOLI,

Associate General Counsel,

MARCEL MALLET-PREVOST,

Assistant General Counsel,

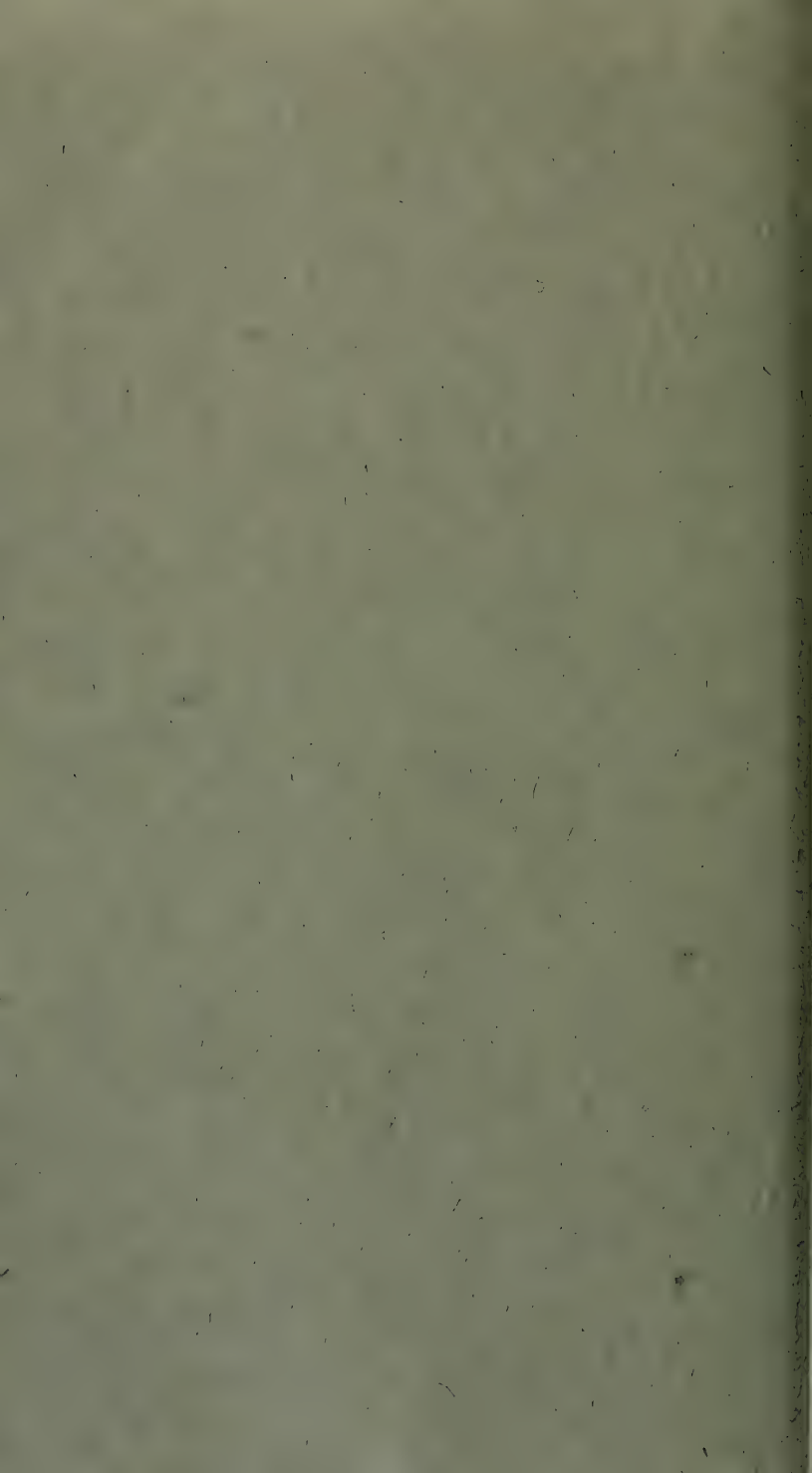
GEORGE B. DRIESEN,

Attorney,

National Labor Relations Board.

FILED

JUL 3 1937



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In the United States Court of Appeals for the Ninth Circuit

No. 21764

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

O'KEEFFE ELECTRIC COMPANY, RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. sec. 151, *et seq.*),¹ for enforcement of its order (R. 12-18, 33-34) issued on April 27, 1966 against respondent.² The Board's Decision and Order are

¹ The pertinent statutory provisions are reprinted in the appendix, *infra*, pp. 13-16.

² References designated "R." are to Volume I of the record reproduced pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript of the testimony as reproduced in Volume II of the record. References designated "G.C. Exh." or "R. Exh." are to exhibits of the General Counsel and respondent, respectively. Whenever in a

reported at 158 NLRB No. 42. This Court has jurisdiction of the proceedings, the unfair labor practice having occurred in San Francisco, California within this judicial circuit.

STATEMENT OF THE CASE

I. The Board's findings of fact

The Board found that respondent, O'Keeffe Electric Company, violated Section 8(a) (3) and (1) of the Act by terminating Wilfred Davies, Richard Dewey, Jerson Hernandez, Gary Walters, Garrick Cliff, Adalberto Rosales and Yves Beurnez on February 24, 1965, because they had joined I.B.E.W. Local 6 (hereinafter referred to as "Union" or "Local 6"). The facts underlying the Board's conclusions follow.

A. Respondent's business, employee complement, and relations with Local 6

Respondent sells, installs, and services certain types of electrical equipment, including small appliances, fans, ventilating systems, air-conditioning systems, and refrigerators (Tr. 13). The business is owned by William O'Keeffe, Sr.; it is managed by William O'Keeffe, Jr.; and it employs an office manager and bookkeeper, Dan Martin (R. 13; Tr. 10, 14). The Company is a member of the San Francisco Electrical Contractors Association, Inc., an association which represents employers engaged in electric engineering in and around San Francisco, California.

Where a series of references a semicolon appears, those references preceding a semicolon are the Board's findings; those following are to the supporting evidence.

n collective bargaining and which has negotiated agreements on their behalf with labor organizations—including Local 6. Fischback and Moore is a member of the Association; and its annual gross volume for services performed in California exceeds \$1,000,000. That corporation annually purchases goods valued in excess of \$50,000 which are shipped to it from outside the state of California (R. 12-13, Tr. 8-9).

Respondent's employees are divided into two categories, both of which were at one time covered by separate agreements negotiated by the Association with Local 6. One group of employees are called wiremen and the other group are maintenance men. At the date of the hearing, the wiremen were still covered by a collective bargaining agreement with Local 6. The maintenance men, with whom this proceeding is exclusively concerned, were covered by Local 6's "Motor Shop Agreement" prior to August 13, 1964 (R. 13; Tr. 138, 176-180, 190-192, 2. Exh. 1, G.C. Exh. 37).

5. Respondent has a disagreement with Local 6, enters into a contract with Sheet Metal Workers Union Local 355 and has its employees join that Union

Sometime in May or June, 1964, respondent hired Richard Dewey as a maintenance man (G.C. Exh. 1). When Dewey was hired, he was sent to Local 6's offices to be cleared, but that clearance was denied (Tr. 41, 117).³ Shortly thereafter, Bill O'Keeffe Jr.

³ The record indicates that Local 6 attempted to get respondent to hire another employee in Dewey's stead. The other employee had been on the Local's out-of-work list longer (Tr. 117-119).

had a telephone conversation with a Mr. Ziff, an official of Local 6 (Tr. 119-120). After the conversation ended O'Keeffe, Jr. told employee Dewey "to hell with the union we don't need those bastards we will go non-Union" (R. 13; Tr. 119-120). Later in July, 1964, O'Keeffe, Jr. asked Dewey to listen in on a telephone conversation between O'Keeffe, Sr. and Mr. Ziff. Dewey testified (R. 14; Tr. 121):

A. The conversation was about what the Union conditions were, what they were going to do about that, and Mr. O'Keeffe, Sr. said as I recollect, he stated the Company had three courses of action to take.

One was to go out of the Union completely the second was to change the name of the company; and the third was to go into the Sheetmetal Workers, the Sheetmetal Production Workers Union, Local 355.

Q. What, if anything, did Mr. O'Keeffe, Jr. say?—A. He felt he wanted to change the name of the company rather than go non-union or go into the Sheetmetal Production Workers Union.

Q. What did Mr. O'Keeffe, Sr. say to that?—A. He felt the best solution, because of the Union situation in San Francisco, was to go into Local 355 rather than be non-Union and it would be less expensive than the other two alternatives.

Q. Did Mr. O'Keeffe, Jr. say anything further?—A. He came to the conclusion that his father was right.

Thereafter, respondent determined to enter into a contract with Local 355 of the Sheetmetal Workers covering respondent's maintenance employees (R. 13

Tr. 176-180, R. Exh. 1). The Local 6 agreement had provided that employees in respondent's shop would earn around \$4 an hour; the Sheetmetal Workers Local agreement provided that production workers would receive \$2.71 an hour (R. 13; Tr. 109, R. Exh. 1, p. 5). Subsequently, respondent asked its maintenance employees to execute wage assignments for initiation fees and dues in favor of Local 55. (R. 13; 155-156, 180-188). O'Keeffe, Jr. explained to employee Hernandez in November of 1964 that he wanted Hernandez to join the Sheetmetal Union because "he didn't want to meet the electrical workers' pay rates." (R. 13; Tr. 166).

Local 6 questions employee Dewey about his membership; the employees join Local 6; respondent lays them off—permanently

Sometime in February 1965, Richard Dewey was working on a job for respondent under contract with Riviera Convertible Mattress Company when he was contacted by Ralph Bell and another business agent of Local 6 (R. 14; Tr. 122). The Union officials asked to see Dewey's membership card, and when he said he did not have one, they told him to get in touch with his employer and to have him contact them immediately. Dewey called O'Keeffe, Jr., who went out to the job and after hearing Dewey's account of what had happened, instructed him to go back to the shop early (R. 14; Tr. 40, 122-123).

As a result of Dewey's experience, he, Cliff, Davies, and Walters discussed with one another the possibility of applying for membership in Local 6 in order to increase their job security. That discussion took place in the shop. A second meeting concerning the

same subject included employee Hernandez and took place on February 19, 1965 (R. 14; Tr. 104, 115-116, 146-148). Office Manager Dan Martin listened into one of the conversations through an intercom system and was observed by employee Walters (R. 14; Tr. 104-105, 116, 148). Martin then came into the shop and joined the group. When one of the employees asked Martin what he thought of the idea of the employees joining Local 6, Martin declined to express an opinion (R. 14; Tr. 105, 115-117, 149).⁴

On February 23, 1965, Dewey, Hernandez, Cliff Walters and Davies joined Local 6 (R. 15; 102, 113-115, 146, 158-159). The next day all the maintenance employees except Moniz were terminated although it was not a regular payday. When they returned to the shop after work, O'Keeffe gave them their terminal checks and told the employees that the layoff was due to financial difficulties and that they might be recalled in two or three days. But O'Keeffe, Sr., who owned the business, commented that it might be a longer time (R. 15; Tr. 15, 27-28, 138-139, 158-159).⁵ Except for Beurnez, none of the employees was ever offered reinstatement.

D. After the discharges, O'Keeffe tells Dewey and Hernandez that the discharges were "a question of the thing that you did behind my back"

In a telephone conversation with former employee Hernandez in March 1965, O'Keeffe, Jr. asked Hernandez whether he had been unfair with him

⁴ The Board's finding that Martin overheard the conversation is based upon the uncontradicted testimony of several of the employees involved. Martin was not called to the stand.

⁵ O'Keeffe, Jr. testified that he kept Moniz on because he was working on the Riviera job, the one on which Dewey had also been working (Tr. 58).

O'Keeffe asked Hernandez if he had anything to say. Hernandez replied, "I thought he had been unfair because he had fired us and the next day he had hired new employees * * *." Hernandez testified that O'Keeffe then asked "unfair in what way?" Hernandez replied, "I didn't think the company had financial troubles." O'Keeffe asked "well, did you come to me." and when Hernandez said "no" O'Keeffe said "I was left with no alternative. There was something going on behind my back" (R. 15; Tr. 54-55; 161-163, 219). O'Keeffe explained that the other employees did not have enough "guts" to talk to him about it and that if they had, he would have explained "the whole problem." Hernandez replied that the employees were not trying to "screw" O'Keeffe, but that they had sought better schooling and more job security by joining the Union. O'Keeffe again asked why the employees had not discussed the problem with him, and Hernandez replied "* * * we didn't have [a] chance because the same day we got fired" (IR 16; Tr. 162-163).

On March 26, 1965, O'Keeffe, in a conversation with Dewey, asked him "do you think it was fair to incite the employees behind my back about going to the Union?" O'Keeffe said, in effect, that except for the employees going to Local 6 behind his back, all their jobs were secure and that "Dan [Martin, the office manager] overheard you talking about going to the Union in the outer office. He added, what do you think I am, a fool? You really didn't think the Union would clear you out, did you?" (R. 15-16, Tr. 125-126).

E. Respondent rehires Yves Beurnez the day after the other employees are laid off and hires additional employees thereafter

On February 25, 1965, respondent hired an employee to replace Dewey (G.C. Exh. 23); on February 26, respondent rehired employee Yves Beurnez, who had initially been hired on February 18, a few days before the layoff (R. 16; Tr. 18, G.C. Exh. 24). Shortly, thereafter, the remaining employees went to Local 355 and signed its out-of-work list (R. 16; Tr. 304-305, 307, 308, 309). They reported weekly, searching for work.⁶ Respondent hired new employees "off the street" on March 1 and 17 and, after placing an ad in the newspaper, hired employees on March 22, May 10, 24, June 7 and August 23 (R. 16; Tr. 288, G.C. Exhs. 15, 10, 7, 14, 20, 16, 17). None of the other terminated employees was rehired.

II. The Board's conclusion and order

On these facts, the Board found that respondent had discriminatorily discharged Davies, Dewey, Hernandez, Walters, Cliff, Rosales and Beurnez.⁷ Accordingly, the Board directed respondent to cease and

⁶ O'Keeffe testified that when he needed employees after February 24, he called the Sheetmetal Workers Union but could not obtain qualified men (R. 5; Tr. 99-100, 208). He admitted that he did not ask for any of the terminated employees by name (*ibid.*).

⁷ Neither Beurnez nor Rosales had signed union cards or, so far as the record shows, had engaged in any concerted activity. The Board concluded (R. 6) that "the facts are strong enough here to warrant a finding that the entire group was discharged because of the protected activity of part of the group. Such a mass discharge discourages union activity of all employees and violates Section 8(a)(3) and (1). *Arnoldware, Inc.*, 129 NLRB 228, 229."

sist from discouraging membership in and activities on behalf of Local 6, I.B.E.W. by discharging and laying off, or failing to reinstate its employees, and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.⁸ In addition, the Board directed respondent to make the employees whole for the losses in wages they had suffered and to offer full reinstatement to those employees not yet rehired (R. 7). Finally, the Board's order directs respondent to post the usual notices stating its intent not to violate the Act in the manner found.

ARGUMENT

The Board's determination that respondent discharged its employees because of their union activity is supported by substantial evidence

The Board's finding that respondent discharged its employees because they had joined Local 6 is overwhelmingly supported by the evidence in the record. First, all the employees were discharged the day after most of them joined Local 6. Second, the record shows that respondent knew about its employees' plans because Office Manager Dan Martin had overheard them discussing their intention to join Local 6. The record further establishes through the testimony of respondents' own officials that they wanted the employees to be members of Local 355, rather than Local 6. Thus, O'Keeffe, Jr. testified that

⁸ Section 7 grants employees the right to join unions or to engage in other concerted activities and the right to refrain from such activity.

“we always have been union” (Tr. 176). In answer to the question “what did you do to maintain the union shop with Mr. Dewey in your employ” (Tr. 176), O’Keeffe, Jr. testified “we checked it with Local that was representing my father’s workers that were employed in the same shop and they said yes, they covered this type of work and they could cover these individuals (Tr. 177).” Asked whether he (O’Keeffe) entered into an agreement with the union that covered other employees in the building O’Keeffe, Jr. testified “yes” (Tr. 177). There is no evidence that any of respondent’s employees had joined Local 355 before O’Keeffe’s decision to deal with it. And the record shows (R. 2; Tr. 166) that O’Keeffe, Jr. preferred Local 355 because its wages and rates were lower.

Respondent’s contention before the Board that it laid off the employees because of a cash shortage was properly rejected, since the evidence shows that that argument was a pretext. A tabular summary of respondent’s net profit, assets and surplus through the years 1961–1965 (R. 5; G.C. Exh. 26–30), shows clearly that respondent’s surplus position had become far worse in previous years when it had not laid off employees (R. 6; Tr. 271–272).⁹ Furthermore, the record shows, respondent hired numerous employees in the months following the lay offs, but never offered any of the laid off employees (except Beurnez) reinstatement. Finally, as shown in the

⁹ O’Keeffe, Jr. testified that business was improving and that the firm’s bank account had been overdrawn before (Tr. 32, 33).

Statement, O’Keeffe admitted to Hernandez and Dewey that its motivation in laying off its employee’s was their going behind O’Keeffe’s back and joining the union. Even without all this evidence, the Trial Examiner’s discrediting of the testimony of respondent’s manager and owner that the discharges were precipitated by its poor cash position is entitled to stand on review in the absence of evidence (and there is none here) that the Trial Examiner’s credibility determination is unreasonable. See *N.L.R.B. v. State Center Warehouse Co.*, 193 F. 2d 156, 157 (C.A. 9); *N.L.R.B. v. Stanislaus Implement & Hardware Co.*, 266 F. 2d 377, 381 (C.A. 9); *N.L.R.B. v. Pine Products Co.*, 361 F. 2d 480 (C.A. 9). Under the circumstances, we submit, the Board’s order should be enforced in full—including that portion relating to employees who did not join Local 6 but were victims of respondent’s mass reprisal. See *American Bottling Corp.*, 99 NLRB 345, enf’d *per curiam*, 205 F. 2d 421 (C.A. 5), cert. denied, 346 U.S. 921; *Arnoldware, Inc.*, 129 NLRB 228, 229 & n. 1 (citing cases). Cf. *N.L.R.B. v. Somerset Shoe Company*, 111 F. 2d 681 (C.A. 1); *N.L.R.B. v. Stremel*, 141 F. 2d 317 (C.A. 10); *N.L.R.B. v. Somerset Classics Inc.*, 193 F. 2d 613 (C.A. 2), cert. denied, *sub nom*; *Modern Manufacturing Co. v. N.L.R.B.*, 344 U.S. 816.¹⁰

¹⁰ Respondent argued to the Examiner that the Board lacked jurisdiction over its operations because the employees were not members of a bargaining unit covered by the Association’s contract with Local 6. But it is clear that respondent’s discharge of these employees for joining Local 6 could have prompted a strike by that Local against respondent and, con-

CONCLUSION

For the reasons stated the Board respectfully requests that its order be enforced.

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JUNE 1967.

CERTIFICATE

The undersigned certifies that he has examined the provisions of rules 18 and 19 of this court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

ceivably, against the Association of which it is a member. Under the circumstances, the law is plain that the Board had jurisdiction over respondent's operations, since it was a member of the Association. For it is the effect on interstate commerce of the employer's entire business, and not the effect on any single group of his employees, that is determinative of the Board's jurisdiction under the Act. See, e.g., *Pearl Beer Distributing Co. v. N.L.R.B.*, 331 F. 2d 301, 302 (C.A. 5), cert. denied, 379 U.S. 830. See generally, *N.L.R.B. v. Reliance Fuel Corp.*, 371 U.S. 224, 226 and cases cited therein; *N.L.R.B. v. Townsend*, 185 F. 2d 378, 389 (C.A. 9), cert. denied, 341 U.S. 909.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 49 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board

shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order, and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that

there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent or agency, and to be made a part of the record * * *. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the * * * Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

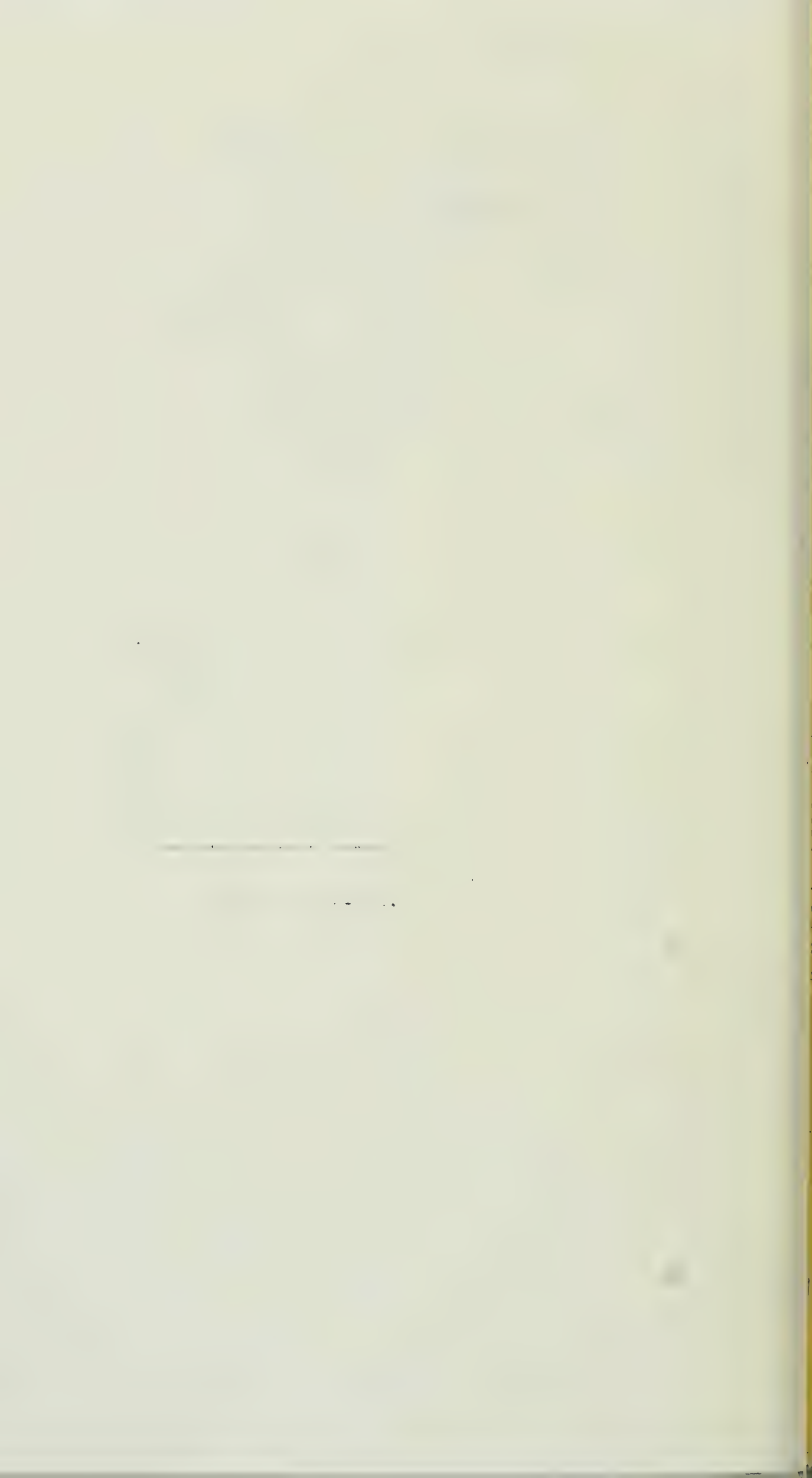
GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received in Evidence
(a)-1(j) -----	6	-----	7
-24 -----	16	-----	18
5 -----	24	-----	26
6-30 -----	29	-----	30
1 -----	102	-----	103
2 -----	114	-----	114
3 -----	146	-----	147
4 -----	158	-----	159
5 -----	170	-----	170
6 and 37 -----	229	-----	-----
6 -----	285	-----	296
7 -----	293	-----	294

RESPONDENT'S EXHIBITS

No.	Identified	Offered	Received in Evidence
-----	177	-----	179
and 3 -----	181	-----	188
-----	182	-----	188
-----	193	-----	197
-----	202	-----	223
-----	291	-----	291

(17)



No. 21,764

IN THE

United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,	}
<i>Petitioner,</i>	
VS.	
O'KEEFFE ELECTRIC COMPANY,	
<i>Respondent.</i>	}

On Petition for Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR RESPONDENT

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FILED

OCT 16 1967

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WM. B. LUCK, CLERK



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No. 21,764

IN THE

**United States Court of Appeals
For the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

O'KEEFFE ELECTRIC COMPANY,
Respondent.

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

BRIEF FOR RESPONDENT

**JURISDICTION OF THE NATIONAL LABOR
RELATIONS BOARD**

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. section 160.

Where an employer's business is local in character, the question whether the Board has jurisdiction is dependent on whether the employer's activities bear such close and intimate relation to interstate com-

merce, or has such a substantial economic effect on commerce, that a work stoppage in the employer's business because of a labor dispute would tend to impede, burden or obstruct interstate commerce or the free flow thereof. *N.L.R.B. v. Conover Motor Co.*, C.A. 10 (1951) 192 F. 2d 779; *N.L.R.B. v. New York State Labor Relations Board*, D.C.N.Y. (1952) 106 F. Supp. 749.

It is respondent's contention that under the facts and circumstances of this case the Board has erred by assuming jurisdiction over the respondent. The relation to interstate commerce and the economic effect on such commerce of the business activities of respondent do not reach a level where it can reasonably be held that the Board can assume jurisdiction over the respondent. It is true that the amount of commerce affected is not the standard by which the Board's jurisdiction is measured unless the volume of commerce that might be affected is so slight as to bring into play the maxim *de minimis*. *N.L.R.B. v. Townsend*, C.A. 9 (1950) 185 F. 2d 378, certiorari denied 71 S. Ct. 621, 341 U.S. 909, 95 L. Ed. 1346; *J. L. Brandeis & Sons v. N.L.R.B.*, C.A. 8 (1944) 142 F. 2d 977, cert. denied 65 S. Ct. 85, 323 U.S. 751, 89 L. Ed 601, rehearing denied 65 S. Ct. 129, 323 U.S. 815, 89 L. Ed. 648. The amount of commerce affected in this case does call for the application of the maxim *de minimis* rule. When the volume of commerce that might be affected is so slight, then the maxim *de minimis* can be raised. *N.L.R.B. v. Townsend*, *supra*

The respondent is a small corporation located in San Francisco (value of assets at close of fiscal 1965 \$49,106.00) which engages in electrical contracting, ventilating, refrigeration and maintenance servicing to various businesses in the San Francisco Bay Area. No income is derived from services rendered outside the State of California. The total purchases of respondent for all material used in its operations for the fiscal year of 1965 was approximately \$33,000.00. The number of employees of respondent generally does not exceed six people. (TR. 261.) The commerce clause cannot be pushed so far as to destroy the distinction between what is solely within the domain of the states and what is subject to federal control. *N.L.R.B. v. Jones & Laughlin Steel*, 301 U.S. 1, 30, 57 S. Ct. 615, 81 L. Ed. 893, 108 ALR 1352.

Petitioner relies on the membership of Fischbach and Moore, Incorporated, a New York Corporation, in the San Francisco Electrical Association, Inc., to establish jurisdiction of the Board. (TR. 4-5.) The annual gross volume of this corporation for services performed in California exceed \$1,000,000.00, and it annually purchases goods in excess of \$50,000.00, which are shipped to the office in California from outside the State. In addition this New York corporation is a party to a collective bargaining agreement with Local No. 6 of the International Brotherhood of Electrical Workers, AFL-CIO, covering inside wiring work. (TR. 8-9.) Respondent's position is that it is not valid to join the business activities of the members

of the San Francisco Electrical Association with those of respondent to empower the Board to assert jurisdiction over respondent herein. *Pearl Beer Distributing Co. v. N.L.R.B.* (C.A. 5) 331 F. 2d 301, cert. denied, 379 U.S. 830. It is not disputed that the maintenance men only are those with whom this proceeding is exclusively concerned as Petitioner stated on page 3 of its brief. As stated above the bargaining agreement with Local No. 6 covers only inside wiring work and not the work done by the maintenance men who are under concern here. A dispute concerning these men could not involve the Association because the bargaining agreement with Local No. 6 covered only the wiremen. It is respondent's contention that it is incorrect to utilize the volume of commerce done by any of the Association members, save of course the respondent, in determining whether the labor dispute would, if a work stoppage occurred, tend to impede, burden or obstruct the free flow of interstate commerce. Local No. 6 would have no grievance against the Association for the alleged unfair labor practice of the respondent because of the lack of a bargaining agreement covering maintenance employees between the Association and Local 6. Respondent respectfully submits that without the inclusion of the other members of the Association, the effect of the labor dispute concerned herein with respondent would fall within the area covered by the *de minimis* rule, and that the Board erred by exercising its jurisdiction in this matter on the basis of the inclusion of said members of the Association.

STATEMENT OF FACTS

Respondent is a very small closely-held corporation whose principal stockholders are Mr. and Mrs. William F. O'Keeffe, Sr. William F. O'Keeffe, Jr. is the manager. The physical plant of respondent is located in San Francisco. It engages in servicing and maintaining fans, ventilating systems, electric motors, air conditioning and refrigeration systems and various types of small appliances. (TR. 10-13.)

The employees of respondent are divided into two classifications. The journeymen wiremen who were covered at all times by a contract with Local 6 and who are not under concern in this matter. The second group are seven maintenance men who were laid off on February 24, 1965, and at that time were covered by an agreement with Sheet Metal Production Workers' International Association, Local Union No. 355. Five of this latter group's activity to join Local 6 by signing authorization cards for that union on the day before their termination represents the grounds upon which Petitioner bases its allegation that respondent violated Section 8(a) (3) and (1) of the National Labor Relations Act, as amended.

Prior to the end of 1963, respondent had its maintenance employees covered by a "Motor Shop Agreement" with Local 6. Although the said agreement expired at the end of 1963, respondent continued to hire through Local 6 until a new contract was signed with Local 355 in August of 1964, to cover respondent's maintenance employees. (TR. 172 and 178-179.)

Sometime in June of 1964 Richard F. Dewey was hired by respondent. Even though the contract covering maintenance employees with Local 6 had expired at this time, Mr. Dewey was sent to Local 6 for clearance as a maintenance man, but the Union refused to clear him. (TR. 37.) However, this man was employed by respondent. Subsequently, Richard Dewey, Jerson H. Hernandez, Gary M. Walters, Gary M. Cliff and Wilfred Davies became members of Local No. 355. (TR. 180-182.)

During the early part of February, 1965, Richard Dewey was working on a job for respondent at Riviera Furniture Company when he was approached by a business representative of Local 6, and was told to leave the job because Dewey was not a member of Local 6 and the type of work he was performing was covered by the contract with respondent. Mr. Dewey was promptly removed from the job site and a wireman member of Local 6 was substituted. (TR. 38-40; TR. 122-123.)

On two occasions after this incident involving Richard Dewey, but prior to February 24, 1965, Dewey, Gary Cliff, Wilfred Davies and Gary Walters on one occasion, and these four plus employee Hernandez on the second instance had discussions at the respondent's shop in the rear of the building. These talks concerned the possibility of all becoming members of Local 6. Other than these aforementioned five men no one was present during these conversations. (TR.

104, 115, 147-148.) After one of the said conversations the respondent's bookkeeper and office manager, Dan Martin, passed by the back office where the aforementioned employees were gathered, and he was asked by either Mr. Cliff or Mr. Dewey what he thought about them joining Local 6. Mr. Martin did not give a specific answer, but only said that he did not know what would happen. (TR. 105, 116-117, 148-149.)

On February 23, 1965, the following maintenance employees of respondent signed authorization cards to have Local 6 represent them: Dewey, Hernandez, Cliff, Walters and Davies. (TR. 102, 113-115, 146, 158-159.) It also happened that on the following day William O'Keeffe, Jr. had a meeting with his father in regard to the critical financial situation that respondent was suffering at that time. The problems discussed between the O'Keeffes on February 24, 1965, included the desperate cash position of the company, the slow collection of the accounts receivable, and why certain jobs were taking longer than anticipated. It was decided at this meeting that respondent had to terminate every employee except Mr. Moniz who was a key man and one wire man who was needed to complete the only contract job so collection on the contract could be made. On the afternoon of February 24, 1965, seven maintenance employees were laid off and were told that the company was having financial problems and that they would be contacted when the problems had been dealt with. (TR. 55-60.)

ISSUES

I

Is the Board's determination that respondent had knowledge of the employees' union activity prior to February 24, 1965, supported by substantial evidence?

II

Is the Board's determination that respondent terminated its employees because of their union activities supported by substantial evidence?

I

One of the required elements that must be proven in order to show that a violation of Section 8 (a) (3) of the National Labor Relations Act, as amended, has occurred is that the respondent had notice of the employees' union activity prior to the discharge of said workers. National Labor Relations Act, 8 (a) (1, 3) as amended 29 U.S.C.A. 158 (a) (1, 3). *N.L.R.B. v. National Paper Co.* (1955), 216 F. 2d 859, *N.L.R.B. v. Ace Comb Co.* (1965), 342 F. 2d 841. The respondent argues that it did not have such notice.

Mr. William O'Keeffe, Jr. testified that he first obtained knowledge that some of the employees had authorized Local 6 to represent them when the National Labor Relations Board notified respondent by mail several weeks after February 24, 1966 (TR. 34). However, Mr. O'Keeffe, Jr. did make a personal attempt on behalf of respondent to have Mr. Richard

Dewey cleared by Local 6 in June of 1964. (TR. 36.) William O'Keeffe, Jr. states having obtained no knowledge either directly or through his office manager, Dan Martin, that the employees were discussing the possibility of talking to a Local 6 representative. (TR. 45-46.) O'Keeffe, Jr. did not even hear of any rumors of the union activity by the employees prior to the layoff. (TR. 54.) Also, the testimony of Gary Valters, Richard Dewey, Gary Cliff and Jerson Hernandez is that O'Keeffe, Jr. did not learn of the union activity prior to February 24, 1965, from any one of them. (TR. 106-107; 110; 153; 163.)

Also in the case of O'Keeffe, Sr. the respondent received no notice of the employees' union activities or even that they were contemplating joining Local 6 prior to the layoff of the maintenance men. (TR. 257-260.)

In regard to the possibility that O'Keeffe, Jr. learned of the union activity from Dan Martin, office manager, prior to the layoff, the record reveals that the statement prepared by the investigator, Mr. Brand, was not a totally true and correct representation of what Mr. O'Keeffe, Jr. related to Mr. Brand. The information that O'Keeffe, Jr. received about the activity to join Local 6 did not come to him until after the layoff in a conversation he had with Mr. Hernandez. (TR. 92-94.)

Petitioner, on page seven of its brief, partially bases its argument that respondent knew of the union activity prior to the layoffs on the conversation be-

tween Richard Dewey and William O'Keeffe, Jr. on March 26, 1965. This conversation took place one month after the layoff date and it does not indicate what date Dan Martin informed O'Keeffe, Jr. of the conversations he overheard. The only reasonable inference that could be drawn from this is that O'Keeffe, Jr. was told by Martin subsequent to the layoffs because O'Keeffe, Jr. told Dewey in this conversation "if I would have known you wanted to go to the Union, I would have taken you down personally and signed you up." (TR. 125-126.) This is completely credible because it is undisputed that Mr. O'Keeffe, Jr. had previously taken Mr. Dewey down to Local 6 to be cleared but was unsuccessful. (TR. 117.) In addition the petitioner, on pages six and seven of its brief, in part bases its agreement that respondent had knowledge of the union activity prior to February 24, 1965, on the telephone conversation between William O'Keeffe, Jr. and Jerson Hernandez. This conversation was held sometime during the first week of March, 1965. Mr. Hernandez said "I didn't think the Company had financial troubles," and O'Keeffe, Jr. answered by saying, "I was left with no alternative. . . ." O'Keeffe also said that if there had been somebody that wanted to talk to him about it, he would have explained the whole problem. (TR. 161-162.) Also O'Keeffe asked Hernandez why he did not tell him about his planning to join Local 6. (TR. 163.) It is Mr. Hernandez testimony that Mr. O'Keeffe, Jr. personally took him down to Local 6 when he began working for respondent and that he

had no difficulty becoming a member of Local 6 (TR. 165.) The conversation does not indicate in any way that O'Keeffe, Jr. had notice of any discussions among the men as to their joining Local 6, or that any of the employees had signed authorization cards on February 23, 1965, at the Local 6 meeting Hall. Rather, the conversation indicates that O'Keeffe, Jr. was referring to the financial problems of the respondent when he told Mr. Hernandez that he had no alternative but to lay the men off because the reply of O'Keeffe was to the statement by Hernandez that he did not believe the company was having financial difficulties. Further in the conversation O'Keeffe stated that if he had known about the discussions, he could have explained everything to the men. This is one more example of O'Keeffe's lack of knowledge prior to the layoffs that the maintenance men were discussing the possibility of joining Local 6.

An additional base on which petitioner relies for his argument that respondent had notice of the union activities before the layoffs are two references made by William O'Keeffe, Jr. that the employees were going behind his back, or that something was going on behind his back. (TR. 125-126; 161-163.) An explanation of what Mr. O'Keeffe, Jr. meant when making these references is found in the testimony regarding an incident involving Richard Dewey and Mrs. Etta Wallace Townsend at her beauty salon in Berkeley. Mr. O'Keeffe, Jr. received a telephone call from Mrs. Townsend two days after the layoffs and she

said that Mr. Dewey had told her the job in progress at her shop would be shut down. (TR. 215-218.) In the subsequent conversation with Richard Dewey in March of 1965 O'Keefe, Jr. referred to Mr. Dewey doing something behind his back and in his testimony O'Keefe stated that the reference was to Dewey's activity with Mrs. Townsend and to other job sites that Dewey visited that same day. (TR. 219.)

The petitioner imputes the knowledge that Dan Martin obtained by overhearing the employees' conversations regarding Local 6 prior to the layoff date to the respondent. It is not disputed that Mr. Martin is an employee of the respondent corporation and that there exists a principal agent relationship between Martin and respondent. However, not everything that is witnessed by the agent is imputed to the principal. It must also fall within the agent's duty and scope of employment. In general the rights of a corporation are not affected unless notice to an officer or agent of the corporation is in regard to a matter coming within the sphere of the agent's duty while attending the business of the corporation. Respondent contends that Dan Martin was not acting within the sphere of his duties for the respondent while he was listening in over the intercom system to the maintenance men, and the information so obtained is thus not imputable to respondent in any degree. *Ohio Farmers Indem. Co. v. Charleston Laundry Co.* (1950), 183 F. 2d 682. A principal is not bound by agent's knowledge acquired while acting outside course of employment for principal. *Hooker v. New Amsterdam Gas Co.* (1940)

33 F. Supp. 672. It must be shown that the agent at some time had duties to perform on behalf of the principal with respect to the transaction, in order to impute knowledge of the agent to the principal in a particular transaction. *Dawn Donut Co. v. Hart's Food Stores, Inc.* (1959), 267 F.2d 358. At no time has evidence been introduced to show that part of Dan Martin's duties was to eavesdrop on conversations of other employees and report to respondent.

Respondent argues that it had no actual or constructive notice of the employees' union activity prior to February 24, 1965.

II

A second element that must be proven before a violation of Section 8 (a) (3) of the National Labor Relations Act, as amended, is found is that the respondent discriminatorily terminated its employees because of their union activities. National Labor Relations Act, Sections 7, 8 (a) (1, 3) as amended by Labor Management Relations Act (1947), 29 U.S.C.A., Sections 157, 158 (a) (1, 3). *N.L.R.B. v. Ford Radio & Mica Corp.* (1958), 258 F.2d 457 and *N.L.R.B. v. Mira-Pak, Inc.* (1965), 354 F.2d 525 and *N.L.R.B. v. Rish Equipment Co.* (1966), 359 F.2d 391. The respondent urges that the Board's determination that it laid off the maintenance men because of their union activities is not supported by substantial evidence.

As previously expressed herein the respondent has made at least two attempts to obtain clearance for its maintenance men in Local 6, and thus has demonstrated its desire to have its employees in that union although the union on both occasions refused to accept the applicant. (TR. 37, 117, 131, 165.)

Around the middle of December, 1964, a meeting was held between officials of Local 6 and respondent wherein the union demanded that respondent discharge all of its maintenance men who were covered by a contract with Local 355 at that time because of an alleged contract covering these same men with Local 6. Respondent refused to discharge any of its employees and denied that any contract existed in regard to the maintenance men. Respondent denied that the signature on the alleged contract was that of any representative of the respondent. (TR. 242-243.)

Petitioner partially bases its argument that the layoffs were discriminatory by showing that respondent hired an employee to replace Richard Dewey; that on February 26 or 27, 1965, respondent rehired employee Beurnez; and that respondent hired new employee "off the street" and not through Local 355 where the employees who were laid off had signed an out-of-work list. A wireman was hired to replace Richard Dewey but that was only to finish one job that was already in progress. (TR. 248.) Mr. Beurnez was rehired because he had come back to the respondent shop a few days after the layoffs and inquired about being rehired (TR. 20) and respondent was in need

of one man to service part of the routes that was previously handled by Beurnez and Walters, i.e. to at least take care of the oldest, most important customers. (TR. 207.) Messrs. Walters and Hernandez were both called on February 26, 1965, before Beurnez was rehired to do the more important service routes. (TR. 207.) The payroll records demonstrate that the men hired after February 24, 1965, were not hired to replace those who were laid off but the new employees performed different tasks or were employed for very brief periods of time. On March 1, 1965, Ivan Amador was hired for three days. (GC. 5.) On March 17, Lauren Eckhoff was hired to do refrigeration installations which none of the men laid off was qualified to perform (GC. 10.) On March 22, Dennis Kelly was employed for two weeks. (GC. 7.) Beginning May 10, 1965, Henry Atwood was employed for only three weeks (GC. 14), May 24, 1965, Dan Todd was hired to do refrigeration installations to replace Eckhoff (GC. 20). Starting in June of 1965, Thomas Hearty, refrigeration man was employed for seven weeks (GC. 16), and Art Moniz, Jr. was hired for two weeks on August 23, 1965 (GC. 7). The record amply shows that the new employees were of a temporary nature or did the type of work that the maintenance men were incapable of performing. Before respondent placed an advertisement in the newspaper, O'Keeffe, Jr. called Local 355 about the middle of March and asked if they had anyone available, and they did not have. (TR. 99-100; TR. 208-209.)

Mr. Beurnez was the only employee who contacted the respondent after the layoffs and who wished to be rehired. (TR. 20.)

Petitioner argues that respondent wanted its maintenance men to be members of Local 355, rather than Local 6, because of the lower wage rates required by Local 355. The record does not support this contention. As an example of the indifference of respondent to Local 6 or Local 355, Mr. Hernandez' case was used at the hearing. He was paid the same wage scale provided for in the Local 6 contract even though he was a member of Local 355 and O'Keeffe, Jr. testified that it made no difference to respondent or to him, whether the employee was in Local 355 or in Local 6. (TR. 189.) Both Dewey and Hernandez were taken to Local 6 for clearance but were refused. This is further evidence of respondent's willingness to have its employees become members of either local, and dispels the contention that respondent preferred one union over the other. The refusal of Local 6 to clear Dewey in mid-1964 left respondent with little choice but to seek other union coverage for Mr. Dewey and other employees who were in the same position as Dewey. Respondent had always been a union shop and O'Keeffe, Jr. was very definitely interested in keeping the union coverage. (TR. 176.)

Petitioner alleges animus on the part of O'Keeffe, Jr. toward Local 6 because of its refusal to clear Richard Dewey. It cites a telephone conversation between O'Keeffe, Jr. and an official of Local 6, M. Ziff, and the remarks of Mr. O'Keeffe, Jr. after the

conversation to the effect that respondent doesn't need the union and respondent will go non-union. (TR. 119-120.) It is a reasonable reaction to an emotional and highly personal situation that involved O'Keeffe, Jr. because he had himself requested Local 6 to clear his friend, Richard Dewey, and was flatly refused. The ensuing developments show that these remarks were only the result of momentary anger. Sometime during the following month, O'Keeffe, Jr. stated that he did not wish respondent to go non-union and because of Local 6's refusal to clear Dewey, it was decided to contract with Local 355 to obtain union coverage for the maintenance men. (TR. 121, 176-180.)

It is respondent's contention that the layoffs of February 24, 1965, were unavoidable and due exclusively to the dire financial situation in which respondent found itself on that date. The activity of the maintenance men prior to the layoffs to join Local 6, even if such was known to respondent, was not the reason for the layoffs. The liquidity of respondent had reached the emergency level which called for drastic measures to keep the business from going under. It is not denied that respondent had experienced financial problems prior to February 24, 1965, but not to the degree that was present on that date. The key money problem was that in February of 1965, respondent had to borrow for the purpose of meeting the payroll and daily operating expenses which it had not had to do in the past. Previous loans were obtained to meet capital expenditures and other

long-term debts but never to meet the weekly payroll and operating expenses. (TR. 261-263.) This would of course alarm the O'Keeffes and they held an emergency meeting on February 24, 1965, to discuss these pressing financial problems. (TR. 57-59.)

Petitioner argues that respondent's contention that it laid off the employees because of a cash shortage is without validity because of the respondent's net profit, assets and surplus through the years 1961-1964 show that respondent's surplus position had been far worse in previous years when it had not laid off its employees en masse. (GC. Exh. 26-30 and TR. 272-272.) However, the cited exhibits cover a yearly period and the periodic emergency financial difficulties are not reflected therein. The dire liquidity position of the respondent which came to light in late February, 1965, would be buried in the yearly totals and the reason for the mass layoff could be revealed only upon a close scrutiny of the respondent's finances at that particular point. It would be quite reasonable to assume that the respondent's net profits, assets and surplus position would be markedly different if the employees were not laid off, and only a few additional temporary men were hired for the balance of 1964.

Respondent had borrowed \$3,000.00 from a bank on February 18, 1965, and on February 24, 1965, respondent's bank account was already overdrawn. (TR. 22-23.) The purpose of the loan was to give respondent time to retrench and obtain some breathing space to collect the many outstanding receivables and keep the business going. Respondent had never borrowed

money for this purpose previously. (TR. 259-263.) Understandably, this sudden loss of cash for operating costs caused O'Keeffe, Sr. to have an immediate meeting with his son about this situation, and how it could be remedied. The prospects for increased income through increased collection of moneys due respondent or work in progress or already completed was very unlikely in view of dissatisfaction of many of respondent's customers with the work done, and several of the larger jobs were entering the litigation stage. (TR. 263-264.) It was not unusual for respondent to lay off three or four men at a time when the work was slow. (TR. 271.) On February 24, 1965, the two O'Keeffes discussed at great length what would be necessary to solve the financial problems that had reached such a critical stage. It was decided that the work crew of maintenance men had to be cut drastically and that O'Keeffe, Sr. would go around and examine the jobs in progress and negotiate settlements with the dissatisfied customers and attempt to increase the inflow of cash. The situation was abnormal for respondent and this was the first occasion that it had to borrow to cover the day-to-day operational expenses. (TR. 261-262.) Even after obtaining the loan on February 23, 1965, there was not enough cash remaining at the end of February to meet the next week's payroll. (TR. 259-60, TR. 204.) The motivating force behind the layoffs was the acute financial distress that left respondent with no choice but to drastically reduce its work force.

ARGUMENT

The Board's determination that respondent discharged the employees because of their union activity is not supported by substantial evidence. It is undisputed that the employees under concern were laid off on the day following the signing of authorization cards, but this fact by itself would not be sufficient to hold that they were discharged because of this activity. There is no direct evidence that respondent had knowledge of this activity prior to the layoff either from any of the employees or from Dan Martin. There is in the record testimony that Mr. Martin overheard some conversations of the employees about the possibility of joining Local 6, but there is a lack of any testimony that Mr. Martin relayed any such information to either O'Keeffe prior to February 24, 1965, although the information may have been given to O'Keeffe at a time subsequent to the layoffs. (TR 125-126.) Also the knowledge of Martin is not imputed to respondent on an agent-principal law basis because he was acting wholly outside his function on behalf of the respondent. The testimony of both O'Keeffes is that it made no difference whether the maintenance men were covered by Local 6 or Local 355, but the circumstances were such that Local 6's refusal to clear maintenance men left respondent with no alternative but to seek other union coverage. The cash position reached a critical stage on February 24, 1965, when the receivables collections were lagging far behind normal, and a loan of \$3,000.00 which was received on February 18, 1965, was already mostly utilized to meet current expenses. This extreme situ-

tion had never occurred in the company's past history. The employees that were hired after February 24, 1965, were on a temporary basis only and were put on the payroll to perform the vitally necessary jobs. (GC. 7, 10, 14-17.) Respondent called Local 355 to obtain these temporary replacements but without success, so it put an advertisement in a San Francisco newspaper. Calls were made by respondent to some of the laid-off employees but only Beurnez responded and said that he wished to return to work. In a statement taken by an investigator, Mr. Brand, it is urged by petitioner that O'Keeffe, Jr. admitted to Hernandez and Dewey that the reason for laying off the employees was their going behind O'Keeffe's back and joining the union. As the record shows, this part of the statement was unequivocally denied by O'Keeffe as an incorrect representation of what was said to Mr. Brand, and also it shows that the reference to going behind O'Keeffe's back was to the activities of Richard Dewey with the customers of respondent immediately after the layoffs.

For the reasons stated it is respondent's contention that it did not lay off any employee because of their union activity, but solely because of the perilous financial condition of respondent at that time and it respectfully requests that the Board's order be reversed and the matter dismissed.

Dated, San Francisco, California,
October 12, 1967.

DAVID A. NORWITT,
Attorney for Respondent.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 30 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DAVID A. NORWITT,

Attorney for Respondent.

FILED

No. 21766

DEC 15 1967

In the United States Court of Appeals

WM. B. LUCK, CLERK for the Ninth Circuit

VERNON O. WHITE and INA C. WHITE,
Appellants,

vs.

STEWART L. UDALL, Secretary of the Interior,
Appellee.

BRIEF OF APPELLANTS

On Appeal from the District
Court of the United States for the
District of Idaho, Southern Division

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**In the United States Court of Appeals
for the Ninth Circuit**

VERNON O. WHITE and INA C. WHITE,
Appellants,

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STEWART L. UDALL, Secretary of the Interior,
Appellee.

BRIEF OF APPELLANTS

JURISDICTIONAL STATEMENT

This is an action for a mandatory injunction and declaratory relief brought pursuant to the provisions of the Administrative Procedure Act (5 U.S.C.A. 1001 et seq.) and the Federal Declaratory Judgments Act (28 U.S.C.A. 2201 et seq.). The District Court had jurisdiction under 28 U.S.C.A. 1361. Venue was properly in the District Court under 28 U.S.C.A. 1391 (e) (Tr. p. 4).

STATEMENT OF THE CASE

In the years 1923 and 1924 the Appellants located two placer mining claims in the Payette National Forest in Valley County, Idaho (Tr. pp. 5, 18).

In the year 1959, the Appellants filed with the Idaho Land Office, Bureau of Land Management, at Boise, Idaho, their application for mineral patent (Tr. pp. 5, 18-19). Thereafter they obtained a final certificate showing that all requirements of law had been met for issuance of patent subject, however, to a mineral examination to determine the mineral character of the land (Tr. pp. 5, 18-19).

In August of 1961, the United States Forest Service requested the Bureau of Land Management to institute adverse proceeding and subsequently a complaint was filed raising only two issues to-wit:

1. Whether a valid discovery had been made on the claims; and
2. Whether the land embraced within the claims was non-mineral in character (Tr. pp. 5, 18-19).

Thereafter an administrative hearing was held in March of 1962 (Tr. pp. 6, 18-19), and through subsequent administrative appeals a decision by the Secretary of the Interior was made on December 3, 1965 (Tr. pp. 6, 18-19). All administrative remedies having been exhausted the present action was commenced in the District Court (Tr. p. 5). Following the filing of an answer (Tr. p. 18) the Appellee filed his motion for summary judgment (Tr. p. 21) based upon the administrative record which was stipulated into the record (Tr. p. 20).

Appellants also filed a motion for summary judgment based upon the administrative record (Tr. p. 37). The District Court entered its memorandum decision and judgment granting Appellee's motion for summary judgment (Tr. pp. 92-95).

SPECIFICATIONS OF ERROR

Appellants claim the District Court erred:

1. In granting summary judgment in favor of Defendant-Appellee and against Plaintiffs-Appellants (Tr. pp. 21, 92).
2. In refusing to grant Plaintiffs-Appellants' motion for summary judgment (Tr. pp. 37, 92).
3. In holding that the administrative proceeding was not arbitrary, capricious, an abuse of discretion, and in accordance with law (Tr. pp. 93-94).
4. In holding that the mining claims in question were not supported by a valid discovery (Tr. p. 95).
5. In holding that the land embraced within the mining claims is nonmineral in character (Tr. p. 95).
6. In holding that the administrative body applied the correct principles of law (Tr. p. 95).
7. In holding that the findings of the Secretary are based on substantial evidence and warranted by the facts (Tr. p. 95).
8. In not holding that the long delay in the final administrative decision was in violation of law, in excess of statutory limitations, and short of statutory right in Appellants.

ARGUMENT

I.

THE COLEMAN DECISION IS DETERMINATIVE OF MANY OF

THE ISSUES IN THIS CASE.

On June 21, 1966, this court decided the case of Alfred Coleman et al. vs. United States of America, Case No. 20,227, a landmark decision in the field of mining law for it has upset much of the labyrinth of administrative law established by the Department of the Interior in the handling of mining cases. While the Coleman case dealt with the validity of building stone claims, much of the decision is applicable to the present case where we are dealing primarily with minerals of limited occurrence.

II.

THE PRUDENT MAN TEST IS THE TEST OF A VALID DISCOVERY.

In this matter the Appellants are claiming discovery of minerals of limited occurrence having intrinsic value. The applicable rule, then, is the prudent man test as established in Castle vs Womble, 19 L.D. 455, and as approved by the Supreme Court of the United States (Chrisman vs Miller, 197 U.S. 313; Cameron vs U.S., 252 U.S. 450; Best vs Humboldt Mining Co., 371 U.S. 334). It is the application of this rule to the facts of each case which presents the difficult problem, not only to the Department, but to the courts.

In prior years the Land Department was less strict in applying the prudent man test; perhaps too lenient. The pendulum has now swung to the other extreme by administrative determination rather than by legislation, contrary to the original intent of Congress.

The Land Department and the Forest Service pretend to recognize the prudent man test and generally state that it is not necessary to show values which will demonstrate that "a claim can be worked at a profit or that it is more probably than not that a profitable mining operation can be brought about," at least in cases involving minerals having intrinsic value.

United States vs C. F. Smith
66 L.D. 169 (1959)

In fact, however, the requirement is so strict, and contrary to legislative intent, that as a practical matter a miner is in the position that he had better prove commercial value or run the risk of being the victim of administrative fiat.

Economic extraction of buried minerals, at least in this case, is not a proper test, nor is it the test contemplated by the Congress.

At the time our mining laws were enacted, and even today, claims by and large were located by the lone-wolf prospector who, with his mule and grubstake, traversed the unexplored areas of the West. When mineral was found a claim was staked and quite often the discovery pit was found to be in the area of least mineral value. Work was done from year to year and eventually a patent was sought. The Congress and the law did not contemplate that before patent could issue mineral had to be demonstrated in commercial value or that a mining company would be interested in the claim.

There are many claims even today which provide a small but adequate living for their owners; work being done on a small scale

by one or two men using elementary tools and equipment. These men do not necessarily seek quick riches, but prefer to make a living content with the knowledge their claims contain ore, which is like "money in the bank."

The mining laws do not require locators of claims to apply for patent within any specified period of time, nor do the mining laws require that all minerals be removed from claims as fast as possible. The only requirement is one of good faith by the doing of annual assessment work.

"As we have observed, a locator is not required under the mining laws to proceed to a patent."

1 American Law of Mining, Sect. 1.23 at p. 68

One case is that of Rummell vs Bailey, 320 Pac 2d 653 (Jan 23, 1958), at pp. 656-657, where it is stated:

"It need not be of any particular assay or richness in quality, nor any specified amount in quantity, nor need it be sufficient that it would immediately pay mining expenses. The only essential is that the discovery must be of such significance that a practical, experienced miner of prudence and judgment would deem it advisable to pursue therein or 'lead' thus furnished and to expend further time, effort or money in attempting to develop the property as a mine."

Lindley on Mines, Vol. 2, p. 772, states as follows:

"The land department, whose function is to determine in all applications for patent what constitutes a discovery, has uniformly adopted a liberal rule of construction. In the judgment of that tribunal, a mineral discovery sufficient to warrant the location of a mining claim may be regarded as proven when mineral is found and the evidence shows that a person of ordinary prudence would be justified in a further expenditure of

his labor and means with a reasonable prospect of success."

Snyder on Mines, Vol. 1, p. 314, Sec. 345, quotes from a decision by Judge Hawley in the case of Book vs Justice Mining Co., 58 Fed. 106, 120, the statement being:

"When a locator finds rock in place containing mineral, he has made a discovery within the meaning of the statute, whether the earth or rock is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery and warrants the prospector in making a location of a mining claim."

Snyder on Mines
Vol. 1, p. 314

One of the leading cases on this subject is that of Narver vs Eastman, 34 L.D. 123, where the Secretary said:

"It does not follow that because there is no clear profit arising from the sale of an article that has been manufactured or produced that it therefore has no commercial value. Take for example the farmer. In the course of husbandry, it frequently happens that different crops raised by the farmer when put in market do not sell for enough to pay the costs of their production and transportation, but can it be truly said crops have no commercial value simply because after the same have been sold and all expenses incident to their production and shipment deducted, there is no clear gain to the farmer, and therefore, as a corollary, that the lands are not valuable for agricultural purposes? And the same may be said as to the entry under this act of land valuable 'chiefly for stone.' Could not the land be valuable chiefly for stone even though, because of its remoteness from market or other causes, the stone could not then be sold for a remunerative price? The statute does not say that the stone must be of a commercial value, or as you construe that term, can be sold at a profit. The statute says, 'lands chiefly valuable for stone.' To adopt the construction you place upon the act requires the interpolation therein of a word so as to make it read

as though Congress had said, 'lands commercially valuable chief for stone,' a thing not justified in view of the plain language use.

Narver vs Eastman

34 L.D. 123, at p. 125

In Tam et al. vs Story, 21 L.D. 440, at p. 442, the acting Secretary said:

"I do not concur in that statement of the law. There must be a discovery before location. (Section 2320, Revised Statutes; Waterloo Mining Company vs Doe, 17 L.D. 111); But after discovery and location a subsequent compliance with the provisions of Section 2323 of the Revised Statutes entitles the explorer to patent, and no showing beyond his first discovery is required by the mining laws of the regulations or decisions of the Department. Indeed, after discovery and location, this Department has held that 'his right of possession is as complete as if he had a government patent, provided he continues to put each year the required amount of labor and improvements thereon.' (Branagan vs Dulaney, 2 L.D. 744) and the Supreme Court of the United States has held that so long as he complies with the statute as to annual labor and improvements, his title is 'the highest known to the law.' Evidently, then, the value of the mineral deposit is a matter into which the government does not inquire after discovery and location, save in a controversy between mineral and agricultural claimants. If the explorer deemed the deposit of sufficient value to warrant the annual labor and expenditure required, he thereby shows his good faith, and a compliance with the other provisions of Section 2325, Revised Statutes, entitles him, on application to entry and patent." (Emphasis added).

The law does not require that the discovery pit be the place where the most valuable ore be found. Even the rule laid down in Castle vs Womble contemplates further development beyond what is at hand in the immediate discovery pit.

In Burke vs McDonald the Idaho Supreme Court said that a valid discovery has been made when a locator

“finds rock, clay or earth, in place, and so colored, stained, changed and decomposed by the mineral elements as to mark and distinguish it from the enclosing country.”

Burke vs McDonald
2 Idaho 679
29 Pac 98 (1892)

In Ambergris Mining Co. vs Day, Judge Ailshie summarized the law on what “indications” the law would treat as substantive evidence in the discovery of the minerals. The Judge also spoke concerning the effect to be given to specific geological conditions and formations which have become recognized and associated with certain minerals found in the area in the discovery of minerals on contiguous ground in these words:

“If a miner has discovered certain mineral indications which he has followed up with the result that a rich and valuable ore body has been developed therefrom, it seems clear that another miner finding similar indications and convictions on contiguous ground or in the immediate vicinity would be in a measure justified in following up these evidences with a reasonable expectation of finding mineral deposits. And this is true even though the indication, rocks and deposits found are such as the expert, scientist, geologist or mineralogist in their finest theories tell him are not evidence of mineral deposits or even that they are evidence of the entire absence of minerals.”

“As a matter of fact and greatly to their credit, those scholars who have added so largely to the store of knowledge have been observant and progressive enough to, from time to time, revise and modify their views and theories to keep apace with the actual demonstrations of the man who risks his judgment and delves into the earth at uninviting and unseemly places. The miner, as

well as the man engaged in any other occupation or business is entitled to act on experience and observation, and while he may not, and indeed will not, always attain the same results, the exception to rule does not preclude him from availing of his own observations and those of his fellows as well as demonstrated existing conditions." (Emphasis added).

Ambergris Mining Co. vs Day
12 Idaho 108
85 Pac 109 (1906)

Geological inference alone cannot substitute for the discovery of a valuable mineral deposit. However, such evidence is relevant.

Rummell vs Bailey
7 Utah 2d 137
320 Pac 2d 653

Opinion evidence is also admissible and is to be weighed according to the qualifications of the witnesses.

United States vs Doane
A-28094 (1959)

Kramer vs Sanguinette
33 Cal App 2d 303
91 Pac 2d 604

While annual assessment work is no substitute for discovery, evidence of such done on mining claims is relevant evidence that the claimants themselves were convinced of a future profitable development of the property.

United States vs Al Sarena Mines, Inc.
61 I.D. 280 (1954)

In this case the Appellants have physically lived and worked on

the claims for years, and for about twenty years have devoted their time, effort and money in the development of the claims.

The Secretary in his decision (Tr. p. 14) bases his decision in part on the fact Appellants have not commenced a mining operation and extracted all of the ore. The law does not require this and it was error for him to impose this requirement as a test of discovery.

The court disposed of this argument in the following language:

"Inasmuch as this case should be remanded to the Department for reconsideration under correct legal standards, there are other matters which deserve brief comment. In his final decision, the Deputy Solicitor remarked that the Appellant did not make the required showing of marketability as to all claims. He said: 'Whether expenditures for improvements on other claims may or may not be credited to these (disallowed) claims is immaterial because it is abundantly clear that there was no marketing of any products from these claims.' The Castle vs Womble prudent man test does not require such a showing, although such evidence is, of course, relevant proof under the issue as to each separate mining claim. The Castle vs Womble test implies a forecast of the reasonably anticipable future."

Coleman vs United States
at p. 18

Therefore, the failure to market products from the claims is wholly immaterial to the determination of the validity of discovery.

III.

THE MINING LAWS DO NOT REQUIRE A SHOWING OF
PROVED ABILITY TO MINE THE DEPOSIT AT A PROFIT.

While the Secretary recognizes this principle of law in his decision (Tr. p. 13) he goes on to add:

“Nevertheless, the value which sustains a discovery must be such that with actual mining operations under proper management a profitable venture may reasonably be expected to result. (Emphasis added).

Isn't this actually imposing a test of proved ability to mine the deposit as a profit? We submit this is not the law. This court also disagrees with the Secretary's view of the law.

“The Interior Department decisions and regulations and Court rulings over the years have been interpretations of the General Mining Law of 1872 (17 Stat. 91), which, with respect to the validity of mining locations and applications for patents of mining claims, has remained virtually unchanged since enactment. The problem here presented concerns the interpretation of ‘valuable mineral deposit’ (30 U.S.C. 22) and ‘valuable deposits’ (30 U.S.C. 29) as used by the Congress. See: Adams vs. United States (9 CCA 1963), 318 F. 2d 861, 870. Since Castle vs Womble, supra, the basis, judicially approved, standard of discovery of a valuable mineral requires proof that a person of ordinary prudence would be justified in further expenditure of his labor and means, with reasonable prospect of success, in developing a paying mine. ‘But value, in the sense of proved ability to mine the deposit at a profit need not be shown.’ Adams vs United States, supra. This is clearly the standard applied to metallic minerals and minerals of limited occurrence.

Coleman vs United States
at p. 12

IV.

LOCATORS' (APPELLANTS') LABOR SHOULD NOT BE CONSIDERED IN DETERMINING WHETHER A MINING OPERATION HAS A REASONABLE PROSPECT OF SUCCESS.

Throughout every phase of the lengthy administrative phase of the present case Appellants have argued the law does not require them to take into account the financial cost of their own labors. To require them to do so imposes a test of marketability to their operations.

The Secretary in his decision (Tr. p. 13) concluded the law to be:

"Labor costs must clearly be considered in determining whether a mining operation has a reasonable prospect of success and there is no reason to treat the value of the labor of the locator any differently from that of one he might hire; either one must be taken into consideration in determining the likelihood of a profitable venture being established."

Again this court takes a different view of the law.

"We have found no case authority on the subject of whether the calculated value of a locator's labor in developing the property should be charged as an expense in determining profitability. This may be because the question has not arisen under the Castle vs Womble test of reasonable expectation of profit, while the Departmental requirement of proof of present profit for location of non-metallic minerals of widespread occurrence is of fairly recent origin. In any event, the history of prospecting and mining in the Western United States records the essence of individualism in economic activity and the Mining Law of 1872 was enacted as a Congressional codification of the procedures and practices of miners. Academic economics has little meaning for a miner and his 'profit' is made if his receipts exceed his out-of-pocket expenditures, although he may be grossly underpaid for his labor."

Coleman vs United States
at pp. 18-19

V.

THE FACT THAT THE CLAIMS ARE IN A NATIONAL

FOREST DOES NOT CHANGE THE PRUDENT MAN TEST.

Section 482, Title 16, U.S.C.A., a part of the original Act authorizing the creation of national forests, contains the following:

"And any mineral lands in any National forest which have been shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions contained in Section 473-482 and 551 of this title."

The prudent man test is the same whether the claim is on or off the forest service land.

In a dispute over timber between a mineral claimant and the forest service a Federal Court said:

"In the well considered opinions in **Telier vs United States**, 131 Fed 273, and **United States vs Rizzenelli**, 182 Fed 675, the conclusion is reached that the rights of a locator of a mining claim within the boundaries of a forest service are substantially those of one who locates such claim upon the public domain."

United States vs Deasy
24 Fed 2d 108

VI.

THE GOOD FAITH OF APPELLANTS IS NOT AN ISSUE IN THIS CASE.

While there was evidence introduced at the hearing of this content that valuable improvements exist on Appellants' mining claims by way of timber and the buildings comprising the Krassel Ranger Station, no charge has ever been made against Appellants that they

have located their claims other than in good faith for mining purposes only.

"If the good faith of the applicant in locating the ground for the asserted purpose of exploiting the minerals therein is an issue, the applicant for patent should be put on notice of the issue in the contest complaint."

Coleman vs United States
at p. 20

VII.

GEOLOGICAL INFERENCE MAY BE CONSIDERED IN THIS CASE.

We believe the rule regarding geological inference was well stated by the Hearing Examiner in two recent decisions.

"Admittedly, the contestee's experts are basing their opinions partly upon geologic inference. While it is true that the courts and the Department of Interior have never accepted geological inference standing alone as a substitute for an actual exposure of mineral sufficient to constitute a discovery, geological inference has been considered as one of the factors which must be weighed by a prudent man in determining whether or not the vein or lode containing valuable mineral warrants further development. **Jefferson-Montana Copper Mines Company**, 41 L.D. 320 (1912). Where the mineral is on the surface, in readily ascertainable amounts, geologic inference can be ruled out. But, where the mineral occurs in vein form below the surface and can only be exposed after extensive development work, geologic inference, to some degree, must be part and parcel of every expert's opinion as to whether economic ore can be found. To rule otherwise would be to nullify the 'prudent man' rule and to allow locations only after the development of commercial ore."

United States vs Lundy

Arizona 10544 (1964)

GFS-BLM-1964-26 (Mining)

"Thus, evidence as to the geology of the region, the proximity of the claims to working mines, the economics of mining, and any other fact or circumstance which might possibly affect the success of a mining venture, would necessarily be considered by a prudent man in determining whether or not he would expend further time and money in following the veins or lodes exposed, and is relevant evidence.

"It has been established that on each of the claims, except the Automobile, there are veins or lodes of rock in place containing valuable minerals. Although most of the assays revealed nominal or very low values which could not in any sense be considered worthwhile to mine, nevertheless the mineralization is there."

"I further conclude that on each of the remaining claims there is an exposure of valuable mineralization sufficient to satisfy the requirements of the mining law as to discovery. This conclusion admittedly rests squarely on the acceptance of Mr. Wright's recommendations. Although these can be termed as theory, and therefore there is no guarantee that a paying mine will result, the law does not require a guarantee of success, only a reasonable prospect of such."

United States vs Henault Mining Co.

Montana 035391 (1964)

GFS-BLM-1964-28 (Mining)

VIII.

ONCE A VALID DISCOVERY IS MADE AT ANY POINT WITHIN THE CONFINES OF THE CLAIMS PATENT SHOULD ISSUE.

The government throughout this proceeding has argued that under the mining laws a mineral claimant is not entitled to patent until after he has made a discovery and the discovery point must be in such a condition that a representative of the Government may confirm the existence of a valid discovery.

The underlined requirement is one imposed administratively and not by law. A valid discovery or discoveries at any point within the confines of the claims is all the law requires for patent. The fact that the mineral examiner may not have been shown or have examined the areas containing the highest values does not preclude an applicant from showing values elsewhere on the claim. To impose such a requirement would be contrary to law, as noted in Coleman, at p. 13 & 14 citing 30 U.S.C.A. Sect. 29.

American Law of Mining states:

“The questions of whether a discovery exists, or when a discovery was made, are questions of fact, and obviously require the introduction of evidence and a decision by the trier of fact. The court, jury or hearing examiner called upon to decide a case involving the question of discovery will ordinarily have a wide latitude for decision for two rather obvious reasons. The first is that in any case of this type, a great deal of evidence will probably be introduced, both of the factual and opinion varieties, and secondly because of the wide latitude for decision found in the intangible character of the applicable rules of law. What a prudent man would or would not do under a given set of circumstances and conditions may vary widely according to the differing viewpoints of different triers of fact, the type of case, and the approach adopted (e.g., the stringent view of the Land Department as opposed to the more lenient viewpoint in cases involving rival locators).”

1 American Law of Mining, Sect. 4.51

There is, therefore, no formula by which the trier of the facts can arrive at what constitutes a valid discovery merely by looking at the assay reports, assuming the correct law is being applied.

IX.

THE ADMINISTRATIVE PROCEDURE ACT REQUIRES EVERY AGENCY TO PROCEED WITH REASONABLE DISPATCH TO CONCLUDE ANY MATTER PRESENTED TO IT.

The original application for patent filed by Appellants was on November 23, 1959, and the final decision of the Secretary of the Interior was not entered until December 3, 1965. The Appellants contend that this delay has been prejudicial to their rights in that they have not been able to proceed with further development and possible sale of the claims.

In a case decided by the Fourth Circuit in 1961 the court observed:

"In paragraph 6(a) of the Administrative Procedure Act, it is specifically provided: '*** every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives.***'

"This is no precatory declaration. It is an enforceable command, made expressly so by Section 10(e) of the Administrative Procedure Act, which provides that the court 'shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law**; (3) in excess of statutory jurisdiction, authority,

or limitations, or short of statutory right; **** "

Deering Milliken, Inc. vs Johnston
295 F 2d 856
4 Cir. 1961

CONCLUSION

From the evidence and entire record in this case it is apparent that had the Secretary applied the correct law the Appellants would have long ago received their patent. There are more than ample showings of minerals to meet the prudent man test.

Mr. and Mrs. White have devoted over 40 years of time and effort on hand working these claims, most years in their spare time, and with the knowledge and confidence their claims contain valuable deposits of gold and silver and other values of prospective marketability. Through the years they have been content to develop these claims on a limited and small scale, having no desire to extract the values more rapidly than they have or required by law. They have had a long and hard struggle as the record in this case will show, in endeavoring to obtain a patent to these two claims. One cannot help but feel that had it not been for some mistake by the Forest Service when it constructed the Krassel Ranger Station upon these claims without first securing the Whites' permission and consent, this contest would not have arisen.

Under-Secretary of the Interior, Clarence A. Davis, in a statement made January 26, 1956, before the Subcommittee on Legislative Oversight, of the Senate Interior and Insular Affairs Committee, and the Subcommittee on Power and Natural Resources of the

House Committee on Government Operations, observed:

"Much of the economy of the Western states has been based upon mining. The results of mining operations are always speculative since it is never possible to state with certainty the value of the minerals under the ground.

The patenting of mining claims over the years, therefore, has gone forward by the thousands, based only upon a discovery and the hope that a profitable venture can be developed. This must be remembered in any consideration of mining problems.

Nevertheless, a few years ago, the Department of the Interior attempted to inject into the mining laws a standard of discovery which required profitable operation and a showing that the mineral deposits had the greater comparative value than other uses. This is not the standard set up by law.

The Department has the authority to open and close areas to mining locations. When lands are opened, they are subject to the mining law as it exists. When they are closed no one can even stake a claim on them.

To allow mining claims to be located and then to judge them on standards other than those set up by the Congress and the Supreme Court is administrative legislation.

If we are to adopt the philosophy that any department of Government is to be vested with such vast powers, then it should be done by an act of the Congress and not by administrative decision."

Howard A. Twitty, Esquire, an outstanding mining attorney of Phoenix, Arizona, said in the July 20, 1962, issue of PAY DIRT:

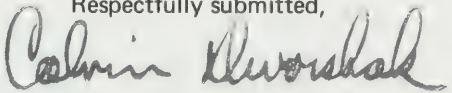
"So long as the Interior Department seeks to make further inroads in the law of discovery of the character illustrated in Altmas and Russell and the New Jersey Zinc contest, the end is not yet in sight. It is to be hoped, when the next discovery

case reaches the courts, the law of **Castle v. Womble** will be restated with definiteness, and we will have a recent judicial precedent setting forth the law of discovery and the reason therefor, as stated in **Castle v. Womble**, without the changes written into the law of discovery by later Interior Department decisions."

We believe Mr. Twitty's wishes and hopes have been met by this court in the Coleman case.

We respectfully urge the granting of Appellants' motion for summary judgment.

Respectfully submitted,



Calvin Dworshak
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CERTIFICATE

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing brief is in full compliance with those rules.



Calvin Dworshak
Counsel for Appellants

SERVICE of the foregoing Appellants' brief is hereby accepted by receipt of three copies thereof this 5TH day of December, 1967.

SYLVAN A. JEPPESEN
United States Attorney

By JAY F. BATES
Assistant United States
Attorney

I hereby certify that on the 5TH day of December, 1967, I served three copies of the within brief upon Edwin L. Weisl, Jr., Esquire, Assistant Attorney General, U. S. Department of Justice, Washington, D. C. 20530, by depositing the copies thereof in the United States mail, at the above address.

Calvin Dworshak
Calvin Dworshak

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VERNON O. WHITE AND INA C. WHITE, Appellants

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION

BRIEF FOR THE APPELLEE

FILED

FEB 1 1968

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21766

VERNON O. WHITE AND INA C. WHITE, Appellants

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION

BRIEF FOR THE APPELLEE

OPINION BELOW

The district court's unreported memorandum decision
appears at pages 92-95 of the transcript of record.^{1/}

JURISDICTION

Jurisdiction of the district court was sought to be
invoked under the Administrative Procedure Act, 5 U.S.C. sec.
701 et seq. (formerly 5 U.S.C. sec. 1001); the Declaratory Judg-
ments Act, 28 U.S.C. secs. 2201 and 2202; and the mandamus statute,

^{1/} The transcript of record prepared by the clerk will be re-
ferred to as "R." The reporter's transcript of the hear-
ings before the Bureau of Land Management of the Department of
the Interior will be referred to as "Tr."

28 U.S.C. sec. 1361. We contend the only jurisdiction of the district court was under 28 U.S.C. sec. 1361.^{2/} Judgment was entered on January 6, 1967 (R. 95). Notice of appeal was filed on February 24, 1967 (R. 97). The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

QUESTION PRESENTED

Whether there is support in the record and the established federal mining laws for the Secretary of the Interior's decision rejecting appellants' application for a patent to lands in the Payette National Forest on the ground that no valuable mineral discovery has been shown.

2/ The Government does not agree with this Court's decision in Coleman v. United States, 363 F.2d 190 (1966), aff'd on reh 379 F.2d 555 (1967), cert. granted, 389 U.S. ____ (Dec. 4, 1967). Since the Supreme Court has granted certiorari in that case, nothing would be gained by further discussion of the applicability of the Administrative Procedure Act. The Government's position, that the only basis upon which a court can review a decision of the Secretary of the Interior is under the mandamus standard of 28 U.S.C. sec. 1361, has been sufficiently preserved and articulated in the Supplemental and Replacement Brief submitted to this Court in the Coleman case (March 1967).

As to the Declaratory Judgments Act, this Court, in White v. Administrator of General Services Admin. of U.S., 343 F.2d 444 (C.A. 9, 1965), held that the Declaratory Judgments Act does not confer jurisdiction on the federal district courts.

STATUTE INVOLVED

Section 1 of the Act of May 10, 1872, 17 Stat. 91, 30

U.S.C. sec. 22, provides:

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

STATEMENT

In 1923 and 1924, the appellants located two placer mining claims within the Payette National Forest (Tr. 153). In 1959, appellants filed an application for a mineral patent with the Bureau of Land Management. Adverse proceedings were instituted at the request of the Forest Service of the Department of Agriculture. After a hearing, and at all subsequent stages of review within the Department of the Interior, the patent application was rejected and the claims were declared null and void for lack of a valid discovery. In rejecting the application and voiding the claim, the Secretary stated (R. 14):

The incredibility of the appellants' contention that they have made a discovery is perhaps most clearly pointed out by the testimony they elicited from their own witnesses that in 1923 and 1924 there existed on the claims mineral deposits that could have been developed by a prudent person with a reasonable prospect of success (Tr. 97, 135-136, 204-205). If this were so, it passes belief that in the 38-39 years elapsing until the hearing appellants mined only 6 ounces of gold. How long were they going to wait before commencing a mining operation, and, more importantly, why were they waiting? The answer seems plain - that they have not yet found any values sufficient to warrant development.

The relevant facts as set out in the Secretary's decision are (R. 11-12):

Two government mining engineers, G. R. Plumb and Vernon Dow, examined the claims and took 14 samples of material thereon. They sampled every discovery point suggested by the appellants (Tr. 15, 69) and also other places selected by themselves (Tr. 69). The examination by Plumb and certificate of assay for these samples showed an estimated value of a low of .6 of a cent per cubic yard to a maximum of about 2 cents per cubic yard of material. The average was less than one cent per cubic yard (Tr. 41-43, 53-60, Exhibits 9, 11). Samples taken from the appellants' workings failed to indicate any significant values (Tr. 55, 57-59, 79-80). Plumb testified that the quality and quantity of materials found were negligible, that mining would not be economically feasible (Tr. 70), and that a prudent man would not be justified in a further expenditure of time and money on either of the claims with a reasonable expectation of developing a paying mine (Tr. 71). Dow concurred (Tr. 88).

Three mining engineers examined the claims for the mining claimants, Bill Harris, Ernest Oberbillig, and Mark Evans. Each sampled the claims and each found some fine gold in the samples. Harris concluded that the deposit was not extensive but was sufficient to justify a small operation (Tr. 96). Evans, a geologist and mining engineer, believed that since gold was found on the surface it was a good indication that pay gravel would be found at depth or at bedrock, although he stated that there was no certainty of it (Tr. 205). Oberbillig made the most thorough examination of the three. He divided the two claims into five parcels (see Exhibit H). He shaded portions of each claim to indicate where he believed placer gravel deposits existed. After sampling parcel No. 1, which is on the western end of the Rubarbe 3/ Additional No. 2 claim, he stated that mining in this area is questionable because of the limited amount of placer gravel remaining in this area (Tr. 114). His examination revealed a very limited quantity of placer gravel on parcel No. 2--possibly 5,000 yards (Tr. 115); parcel No. 2 comprises about one-fourth of the western end of the Ruewbarb claim. Parcel No. 3, which comprises the remaining part of the Ruewbarb claim, has about 30,000 yards of minable gravel (Tr. 123). Parcel No. 4, which covers the largest area of the Rubarbe Additional No. 2 claim, has only about 600 or 700 yards of minable gravel, and parcel No. 5, located along the eastern line of the Rubarbe Additional No. 2 claim, has 800 to 1,000 yards of minable gravel (Tr. 125). Oberbillig concluded that only parcel No. 3 on the Ruewbarb claim would support a mining operation and then only a one- or two-man operation (Tr. 135). His opinion of the material in the discovery cut

3/ Rubarbe and Ruewbarb refer to two different claims.

on the Ruewbarb claim was that the gravel in the pit was very good material for concrete gravel, but it was not essentially a strong mineral carrier (Tr. 127). Based on his examination, Oberbillig concluded that parcel No. 3 on the Ruewbarb claim is conducive to a one- or two-man operation, but that the prospects of operating a paying mine on the Rubarbe Additional No. 2 are questionable (Tr. 135, 136).

It is apparent that what exists on these claims, from the results obtained by both the mining engineers for the Government and appellants, is some fine gold and small values not sufficient to justify a prudent man to undertake a mining operation.

The certificate of the assays of two samples taken by mining claimant Vernon White (Exhibits N, O) showed exceptionally high values (\$9.62 per ton and \$560 per ton). They were so far in excess of the values recovered by the mining experts who testified for him that his sampling cannot be considered to be representative and little probative value can be given to it. This is further evidenced by two statements by White. He testified that he had recovered only six ounces of gold since 1924, and, further, he stated that the claims are not ready to pay at this time (Tr. 184). These statements certainly must cast considerable doubt on the results of his sampling.

Appellants filed this suit, seeking review of the Secretary's decision, reinstatement of their mining claims and issuance of a patent (R. 4-7). The district court, after reviewing the entire administrative record, gave the following summary of the evidence presented at the hearing (R. 94-95):

At the hearing before the examiner, the defendant accepted the burden of producing a prima facie case to support the contest against the patent application. Two qualified mineral examiners related the tests and examinations made by them and the results thereof. They testified to a finding of negligible valuable minerals present on the claims. Each then, as an expert, expressed the opinion that a prudent man would not be justified in expenditure of additional time or money in an effort to develop a paying mine on plaintiffs' claims. They were positive that valuable mineral was not present in sufficient quantity to justify further exploration or work and that the land was not mineral in character.

After the presentation of the foregoing testimony, the plaintiffs undertook to prove the existence of a valid discovery and that the land was mineral in character. The evidence so produced by the plaintiffs tended to support plaintiffs' position. However, plaintiffs' evidence was far from overpowering. At most it put the matter at issue.

The court affirmed the decision of the Secretary on the grounds that (R. 95):

Where the evidence is conflicting, but the findings of the Secretary are based on substantial evidence, those findings are binding on this Court. Clearly the findings that the claims in question were not supported by a valid discovery and that the land is nonmineral in character are based on substantial and competent evidence. On this record the Secretary's order must be sustained.

Judgment in favor of the Secretary was entered January 6, 1967 (R. 95), and this appeal followed (R. 97).

SUMMARY OF ARGUMENT

I

The Secretary, in determining whether appellants have made a valuable mineral discovery as required by the Act of 1872, supra, p. 3, properly applied the "prudent man" test of Castle v. Womble, 19 L.D. 455, 457 (1894). Embraced within that test is the requirement that claimants show that, if mining operations are continued, there is a reasonable prospect that it will be a profitable venture. In the present case, there was substantial evidence to support the Secretary's decision that there was no valid discovery, and therefore his decision is binding on this Court.

II

There is no merit to appellants' other contentions. The worth of a claimant's labor is an essential consideration in determining whether he has made a valuable discovery. No geological inference of discovery is available from the discovery of six ounces of gold in 40 years of mining. Administrative delay does not validate an invalid mining claim.

ARGUMENT

I

THE SECRETARY OF THE INTERIOR APPLIED THE
CORRECT STANDARD FOR DETERMINING WHETHER A
VALID DISCOVERY HAD BEEN MADE AND HIS
DECISION IS SUPPORTED BY SUBSTANTIAL
EVIDENCE

A. The Secretary applied the "prudent man" test in determining the validity of the discovery in this case. - That standard, as first articulated by the Secretary in Castle v. Womble, 19 L.D. 455, 457 (1894), was that:

* * * where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

At an early date, the Supreme Court, in Chrisman v. Miller, 197 U.S. 313, 322 (1905), adopted the "prudent man" test as the correct standard by which to satisfy the requirements of the statute. The Court reaffirmed its adoption of the "prudent man" test in Cameron v. United States, 252 U.S. 450, 459 (1920). More recently, the Court, in Best v. Humboldt Mining Co., 371 U.S. 334, 336 (1963), again cited with approval the test enunciated in Castle v. Womble. As shown in his opinion (R. 12), and appellants (Br. 4), the Secretary did apply the "prudent man" test in his decision rejecting their application for patent.

While not controverting the foregoing, appellants seem to urge that the Secretary erred in considering whether a "profitable venture may reasonably be expected to result" (Br. 12).

The reasonable expectation of a "profitable venture" necessarily is embraced in the basic requirements of the "prudent man" test set out in Castle v. Womble. The Court, in Chrisman v. Miller, 197 U.S. 313, 322 (1905), said "* * * 'The mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral' * * *." In Diamond Coal Co. v. United States, 233 U.S. 236, 239-240 (1914), Mr. Justice Van Devanter further defined the character of a valid discovery of a valuable mineral deposit when he stated that, for land to be valuable for minerals, "* * * it must appear that the known conditions at the time of those proceedings were plainly such as to engender the belief that the land contained mineral deposits of such quality as would render their extraction profitable and justify expenditure to that end." [Emphasis added.]

This Court, in Mulkern v. Hammitt, 326 F.2d 896, 897 (1964), and in Adams v. United States, 318 F.2d 861, 870 (1963), recognized that the "prudent man" test encompassed consideration of the reasonable expectation of a profitable venture. In Adam

v. United States, this Court said (p. 897):

In applying this test [the prudent man test] evidence as to the cost of extracting the mineral is relevant and evidence of that character was submitted by Adams as well as the Government. The agency properly considered this evidence, not to ascertain whether assured profits were presently demonstrated, but whether, under the circumstances, a person of ordinary prudence would expend substantial sums in the expectation that a profitable mine might be developed. The agency did not, in this regard, apply an improper standard.

So here, the Secretary of the Interior applied the proper standard and did not err in considering the reasonable expectation of a profitable venture in applying that standard.

B. The Secretary's decision was based on substantial evidence. - This Court, in Henrikson v. Udall, 350 F.2d 949, 950 (1965), discussed the "substantial evidence rule," and the propriety of applying it to mining cases. The Court said:

It is the function of neither this court nor of the District Court, in a proceeding such as this, to weigh the evidence adduced in the administrative proceeding. Rather, if upon review of the entire record of that proceeding there is found substantial evidence to support the Secretary's decision, that decision must be affirmed. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951), Foster v. Seaton, 106 U.S.App.D.C. 253, 271 F.2d 836 (1959).

See also Pan American Petroleum Corporation v. Udall, 352 F.2d 32, 35 (C.A. 10, 1965), and Morgan v. Udall, 306 F.2d 799 (C.A. D.C. 1962).

The Secretary in his discussion has carefully reviewed the evidence presented before the Hearing Examiner. This review contains extensive references to the transcript of proceedings before the Hearing Examiner and quotes from that record (R. 17-26). A reading of the Secretary's discussion of the testimony offered by both parties, and his analysis of it, shows without question that his decision was based upon ample supporting evidence in the record. Since the decision of the Secretary explains in considerable detail the basis in fact for his decision, no further review of the evidence is necessary here. We submit that the evidence reviewed, upon which his decision was based, is substantial and fully supports his decision.

II

THERE IS NO MERIT TO APPELLANTS' OTHER CONTENTIONS

Since there is plainly no merit to the other argument made by appellants, we will treat them summarily.

Contrary to appellants' contention, labor should and must be considered in determining whether it may "reasonably be expected" that a mining operation will be a "profitable venture". The man of ordinary prudence in Castle v. Womble, is one who expends both "his labor and means." The worth of the labor

expended is an essential ingredient of the test. Surely no prudent man would be justified in working eight hours a day to earn 50 cents over his out-of-pocket expenses. Only a man with no other market for his labor would be warranted in pursuing such a course. Fortunately, this is not the situation of the appellants in this case (Tr. 152), and such a unique man could not fit the ordinary prudence test.

Contrary to appellants' contention, geological inference will not satisfy the requirements of a discovery of a valuable mineral deposit. E.g. Chrisman v. Miller, 197 U.S. 313, 322 (1905); Oregon Basin Oil & Gas Co. v. Work, 6 F.2d 676, 678 (C.A. D.C. 1925). In any case, the extraction of only six ounces of gold in 40 years of mining (Tr. 165) seems to defeat any reasonable geological inference.

Appellants have not suffered prejudicial delay in pursuing their administrative remedies. It was their responsibility to show a valid discovery. They have had over 40 years in which to do it. The delay they claim to have suffered in the light of this, as well as the substantial case load under which the various levels of the Department of the Interior operate,

makes the appellants' contention de minimis.^{4/} In any event, administrative delay does not validate an invalid mining claim so as to require disposal of the public domain contrary to statute.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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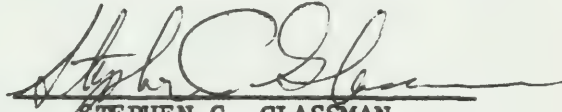
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JANUARY 1968.

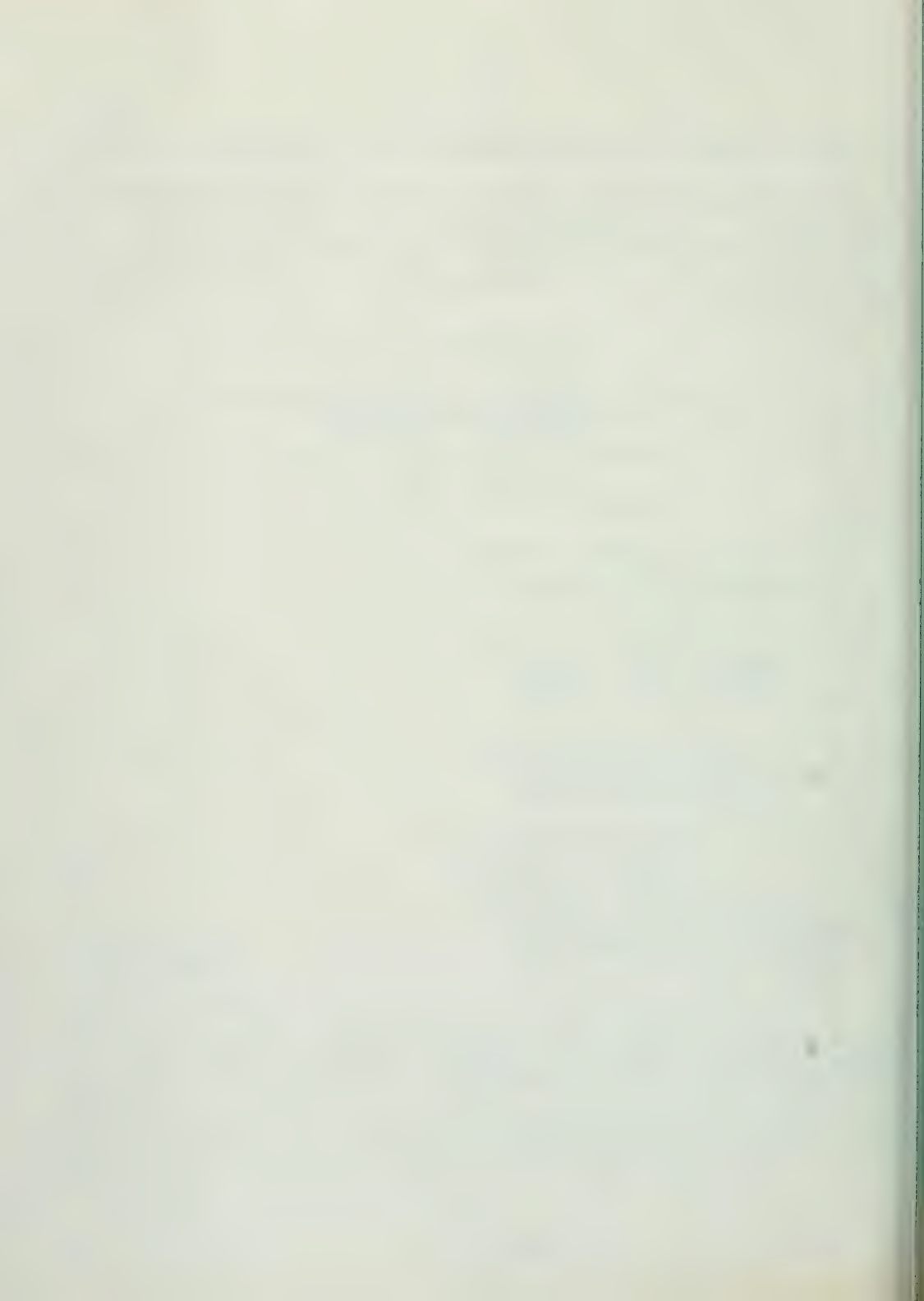
^{4/} In fiscal year 1967, the seven Hearing Examiners of the Bureau of Land Management handled 841 claims, held 160 hearing and rendered 287 decisions. The Office of Appeals handled 871 appeals and rendered 507 decisions. Appeals to the Secretary of the Interior in Bureau of Land Management cases number 265. The Secretary rendered 217 decisions in BLM matters.

CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

A handwritten signature in dark ink, appearing to read "Stephen C. Glassman", written over a horizontal line.

STEPHEN C. GLASSMAN
Attorney, Department of Justice
Washington, D.C. 20530



No. 21767 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Petition of WATERMAN STEAMSHIP CORPORATION, a corporation, owner of the vessel SS CHICKASAW, for exoneration from or limitation of liability,

GAY COTTONS, INC., *et al.*,

Cargo Claimants,

SHALOM BABY WEAR,

Cargo Claimant,

UNITED STATES OF AMERICA,

Cargo Claimant.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF OF APPELLANT WATERMAN STEAMSHIP CORPORATION.

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LEO J. VANDER LANS,
DON A. PROUDFOOT, JR.,

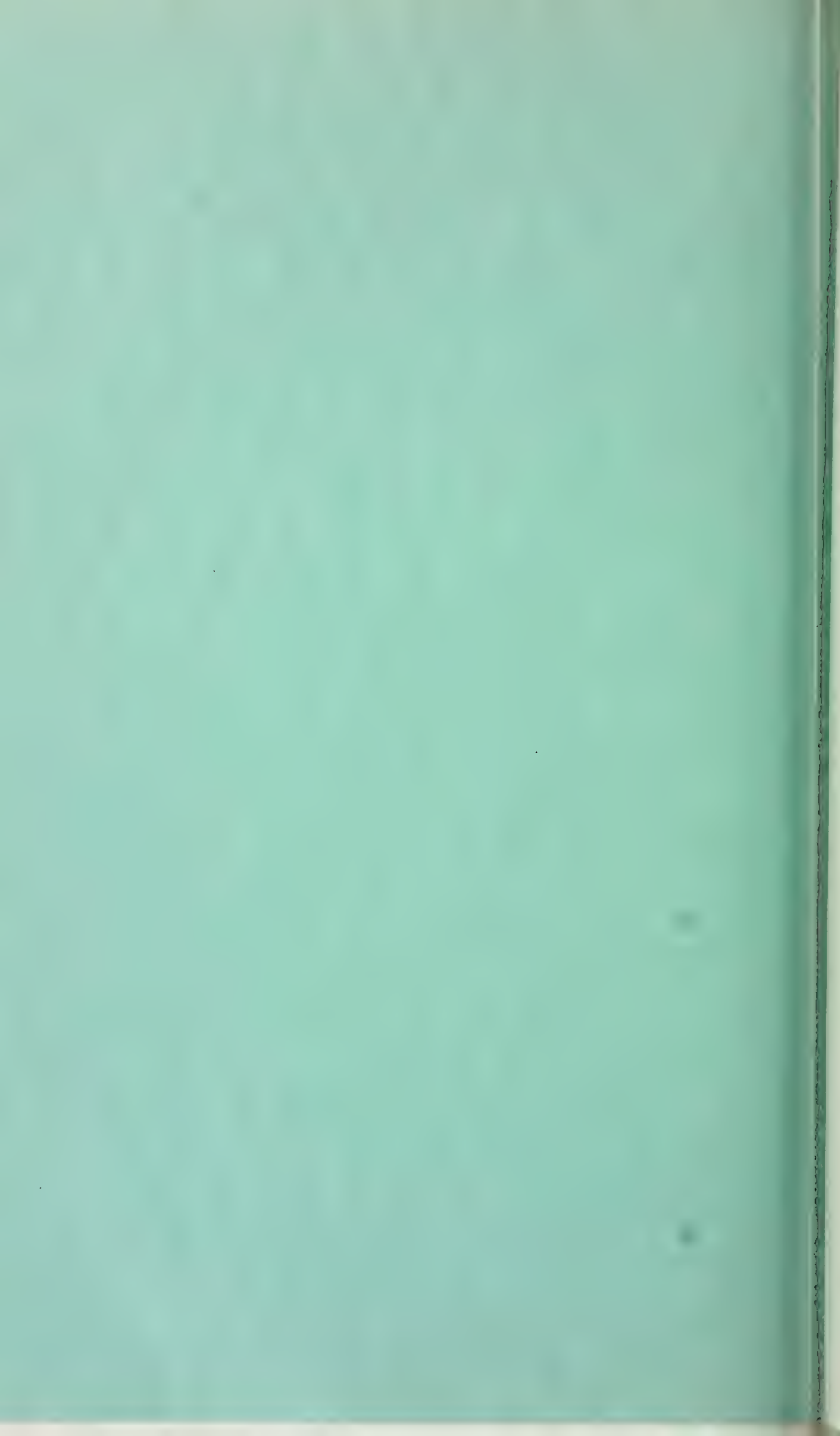
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No. 21767

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Cargo Claimants,

SHALOM BABY WEAR,

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UNITED STATES OF AMERICA,

Cargo Claimant.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF OF APPELLANT WATERMAN STEAMSHIP CORPORATION.

Jurisdictional Statement.

This is an appeal from a decree entered on October 25, 1965 by the United States District Court for the Southern District of California, Central Division, denying Appellant's Waterman Steamship Corporation, petition for exoneration from or limitation of liability [R. 853].

On February 7, 1962, Appellant's vessel, the American merchant vessel SS CHICKASAW, ran aground upon the shore of Santa Rosa Island off the California coast. Jurisdiction of this admiralty matter was vested in the District Court under Article III, Section 2 of

the United States Constitution and 28 U.S.C. Section 1333 (1). On December 15, 1966 the District Court's order denying Appellant's motion for a new trial was filed [R. 903]. Within thirty days of entry of said order denying Appellant's motion of a new trial, on December 22, 1966, a notice of appeal was filed by Appellant [R. 919]. Jurisdiction is conferred on this court by 28 U.S.C. Sections 1292, 1294 and 2107.

Statement of the Case.

On February 7, 1962, the SS CHICKASAW, owned by Waterman Steamship Corporation (hereinafter called Waterman), ran hard aground on Santa Rosa Island, California. Thereafter, Waterman filed its petition to be exonerated from the result of this standing or, in the alternative, to limit its liability to the amount of the limitation fund, approximately \$250,000. Only the liability issue was tried in the District Court. A determination as to damages, if any, will be made when the liability has been finally determined.

From early September 1961 until November 4, 1961, when she departed from Mobile, Alabama, enroute to the Far East, the SS CHICKASAW was subjected to various inspections and examinations. These included a special survey by the American Bureau of Shipping and inspections by the United States Coast Guard and the Federal Communications Commission. Following its inspection the vessel was retained in class by the American Bureau of Shipping which also issued a Load-Line certificate [Tr. pp. 1247-1248]. The Coast Guard conducted an annual examination and passed the vessel. The ultimate objective of this examination was to ascertain whether the CHICKASAW complied

with the statutory requirements, as well as to determine the safety of the vessel and the equipment aboard her [Tr. pp. 841, 1285].

On November 3, 1961, all of the ship's radio equipment passed its annual Federal Communications Commission inspection. The purpose of this inspection was to see that the vessel complied with the Communications Act of 1934 and the requirements of the Safety Convention [Tr. p. 949].

Emanuel Patronas, who had been sailing as master for Waterman since 1948, was given command of the CHICKASAW and reported aboard on November 3, 1961 [Tr. pp. 163, 164, 1165]. Each of the other four deck officers was also licensed by the United States Coast Guard to sail as master [Tr. p. 1362].

The CHICKASAW departed Mobile on November 4, 1961, for Gulf and Pacific Coast ports and then the Far East. The crossing to Japan was uneventful, except that the radar antenna stopped operating a few days prior to arrival. On December 21, 1961, the day following the CHICKASAW's arrival at Yokohama, the radar was inspected and it was determined that some of the teeth on the pinion gear which operated the antenna were broken [Tr. p. 1103]. The repair company could not obtain the part and did not repair the radar [Tr. pp. 1100, 1105]. The replacement part was not available in Japan [Tr. pp. 220, 1064].

The CHICKASAW discharged and loaded at various Far Eastern ports and on January 27, 1962, she departed Yokohama bound for the West Coast of the United States on a course of 094 degrees true, 090 degrees gyro, and a speed of 16.5 knots [Tr. pp. 63, 64].

On February 2, the Captain determined to make his landfall five miles south of South Point Light on Santa Rosa Island, California [Tr. p. 63].

The last celestial fix before the grounding was obtained at noon on February 5. This was by a meridian altitude of the sun which established both longitude and latitude [Tr. p. 299]. On February 6, the noon dead reckoning position was plotted by the 2nd Mate who used a speed of 16.7 knots, course 091 degrees from the preceding noon [Tr. pp. 303, 336].

At noon on February 7, the 2nd Mate also plotted the dead reckoning position on the vessel's chart, for which he assumed a course of 091 degrees gyro and a speed of 16.6 knots [Tr. p. 336]. This position placed the vessel four miles north of the projected track line which was laid out to pass five miles south of South Point [Tr. pp. 63, 71, 336]. At 1446, on February 7, the vessel's engines were put on standby because of low visibility and from that time until the stranding, a bow lookout was posted [Tr. pp. 106, 107]. At 1640 hours, February 7, a radio direction finder (RDF) fix was obtained by taking radio bearings on Point Arguello and Point Sur [Tr. p. 304]. This fix showed the vessel to be five miles north of its projected track line [Tr. p. 101].

After the 1640 fix was placed on the chart [Pet. Ex. 34], the Captain told the 2nd Mate, who was on watch, to run another hour or so on the same course and then take another check [Tr. p. 305]. At 1735, the 2nd Mate obtained an RDF line of position on Point Sur, which the Captain noted, but the Mate was unable to secure a bearing on Point Arguello due to excessive static conditions [Tr. p. 305]. At 1854, RDF

bearings on Point Arguello and Point Sur were obtained [Tr. p. 306]. This fix placed the vessel 11 miles south of its projected track line.

No computation was made between the 1640 and 1854 position. Such a computation would have revealed speed of 17.8 knots and a course of 115 degrees during a period when the vessel was steering 090 degrees.

At 1933, the 2nd Mate obtained a bearing on Point Arguello [Tr. p. 306]. He could not get a bearing on Point Sur at that time "due to a lot of static." [Tr. p. 318]. At 2020, the 3rd Mate obtained and plotted a bearing on Point Arguello [Ex. 52]. The Captain ran the 1933 line of position up to 2020. This indicated he was north (on the Santa Rosa Island side) of his projected track line [Tr. p. 87]. At 2025, the Captain advanced the 1933 line of position to 2020, using a course of 090 degrees and a speed of 16.7 knots. This placed the vessel approximately five miles north of the projected course line [Tr. p. 87]. At 2040, the captain attempted to get an RDF bearing on Los Angeles light at San Pedro breakwater. He was unable to do so as the radio beacon was then over 100 miles away and beyond the effective range of the RDF [Tr. p. 89].

Based on his "instinct" and judgment the Captain, at 2040, assumed the vessel's position [Tr. pp. 97-99].¹ The Captain then projected a course line from his assumed 2040 position and changed course to 098 degrees gyro, hoping to make good a course of 095 de-

¹The Master testified that he "assumed the ship was there. The two bearings the 2nd Mate took did not coincide with each other so I assumed the ship was a little further south. That is my own judgment." [Tr. pp. 97, 98].

grees true [Tr. p. 100]. The 3rd Mate obtained an RDF bearing at 2110 [Tr. p. 92]. The Captain then made various calculations in the chart room which took a few minutes, and then he went onto the wing of the bridge; two or three minutes later the ship struck bottom [Tr. p. 145]. The grounding took place at 2117 hours on February 7, 1962.

On August 4, 1966, the District Court filed its Memorandum Opinion denying exoneration from or limitation of liability. Findings of Fact and Conclusions of Law were filed October 25, 1966, and the Decree was entered the same date.

Specification of Errors.

1. The deposition of 3rd Mate Jensen was erroneously admitted into evidence.

In the pretrial conference order [R. 348], the admission into evidence of all *completed* depositions was stipulated. Jensen's deposition was not completed and at two places in the record, argument was heard by the Court on the question of the admissibility of the incomplete Jensen deposition. This argument appears in the Reporter's transcript between pages 8 and 15, and again in the Reporter's transcript between pages 673 and 684. The substance of Appellant's objection to the admission of the Jensen deposition in evidence was its complete lack of opportunity to cross-examine Jensen at the deposition.

Only a short portion of Jensen's deposition was read into the record, that portion appearing in the Reporter's transcript between pages 665 and 673. The substance of Jensen's testimony read into the record was that on December 25, 1961, while in the Inland

Sea of Japan, he attempted to use the fathometer and obtained a condition of red flashes around the dial, whereafter he reported to the Master that the fathometer was inoperative. Jensen further testified that subsequent to December 25, 1961, he did not use the fathometer because he believed it to be inoperative. The remainder of the Jensen deposition became part of the record at the trial court when the entire deposition was admitted into evidence as claimants' Exhibit H. No attempt is made here to summarize the remainder of the 48-page deposition as it covers the entirety of the last voyage of the CHICKASAW in some detail, is cumulative of the other evidence received, and no party thought it important enough to read into the record.

2. Conclusion of Law (1) [R. 850] is erroneous in that Finding of Fact (4) [R. 846] shows that the failure of due diligence found by the lower court did not occur until December 25, 1961, after loading at two ports for three days. At the very least, therefore, Appellant is entitled to exoneration as to the cargo loaded on those days.

3. Finding of Fact (6) [R. 848] and Conclusion of Law (3) [R. 851] are based on the erroneous legal proposition that Appellant owed to claimants a non-delegable duty of due diligence to make its vessel seaworthy prior to the commencement of the voyage for the purposes of the limitation of liability statutes. No such duty exists.

Statutes and Rules Involved.

A. The Carriage of Goods by Sea Act, 46 U.S.C. Section 1301, *et seq.*

“1304 (1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of Paragraph (1) of Section 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this Section.

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the Master, Mariner, Pilot, or the servants of the carrier in the navigation or in the management of the ships;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

- (f) Act of public enemies;
- (g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;
- (h) Quarantine restrictions;
- (i) Act or omission of the shipper or owner of the goods, his agent or representative;
- (j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;
- (k) Riots and Civil Commotions;
- (l) Savings or attempting to save life or property at sea;
- (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;
- (n) Insufficiency of packing;
- (o) Insufficiency or inadequacy of marks;
- (p) Latent defects not discoverable by due diligence; and
- (q) Any other cause arising without the actual fault and privity of the carrier or without the fault or neglect of the agents or servants of the carrier, but the burden of the proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage. . . ."

B. Limitation of Vessel Owner's Liability, 46 U.S.C. Section 181, *et seq.*

"Section 183 (a). The liability of the owner of any vessel, whether American or foreign for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this Section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. . . ."

Summary of Argument.

1. Depositions are admitted under the recorded testimony exception to the hearsay rule only when the party against whom they are offered had an opportunity to cross-examine the deponent during his deposition.

2. In the instant action John Jensen's deposition was adjourned as a result of Jensen's illness before Appellant had an opportunity to cross examine him; before the deposition was recommenced, Jensen died. Jensen's deposition, which provides the only causal link between the fathometer and the stranding, was therefore erroneously admitted.

3. The only basis for denial of exoneration was the failure of Captain Patronas to take action after being advised that on December 25, 1961 the fathom-

eter did not operate properly; therefore Appellant, in any event, is entitled to exoneration from loss or damage to cargo loaded prior to that date.

4. Cogsa's non-delegable duty to make seaworthy is not a general duty for the purpose of limitation of liability; if exoneration under Cogsa is denied for failure to use due diligence to make a vessel seaworthy, limitation still must be granted upon a showing that the failure to use due diligence was not that of managerial or supervisory personnel.

5. For the purposes of limitation of liability, the negligence of a master in failing to exercise due diligence to repair or check navigational equipment in foreign ports, when that responsibility has been delegated to him by owners, is not imputed to owners to deny limitation.

ARGUMENT.

I.

Introduction.

This action combines the elements of two law suits. The first deals with exoneration under the Carriage of Goods By Sea Act, 46 U.S.C.A. § 1301 *et seq.* (hereinafter referred to as Cogsa), and the second limitation of liability from the results of a maritime casualty to the value of the vessel and the then pending freight under 46 U.S.C. § 183. The elements were presented to the lower court in a single petition for exoneration or limitation by Appellant under the provisions of the Supreme Court Admiralty Rule 53. The trial court held that Appellant was not entitled to either exoneration under Cogsa or to limitation of its liability under the Limitation of Liability Statute.

Appellant's argument on this appeal has three phases. First, Appellant contends that it was erroneously denied exoneration under Cogsa, because the testimony of third mate Jensen, upon which the denial of exoneration was predicated, was erroneously admitted. Second, Appellant contends that irrespective of the disposition of its general contentions with respect to exoneration and limitation of liability, it was improperly denied exoneration with respect to cargo loaded on board the CHICKASAW on or before December 25, 1961. Finally, Appellant contends that based on the lower court's findings, even if the denial of exoneration is sustained, it was entitled to limitation of liability as a matter of law.

II.

**The Deposition of John Jensen Was Erroneously
Admitted Into Evidence.**

Over Appellant's objection, the incomplete deposition of Jensen, 3rd Mate of the CHICKASAW at the time of the casualty, as well as his Coast Guard testimony, were admitted into evidence [Tr. pp. 681, 682].² The deposition was halted because of Jensen's illness, subject to continuation by claimants who had not completed their direct examination. The Appellant did not waive cross-examination, nor was the failure to obtain it in any way attributable to Appellant [See Claimants' Ex. H, Deposition of John Jensen]. When claimants sought to resume the deposition in May of 1963, it was learned that Mr. Jensen had died. Therefore, the deposition should have been suppressed. *Inland Bonding Company v. Mainland National Bank of Pleasantville*, 3 F.R.D. 438 (1944).

It is noteworthy that:

"The common law judges and lawyers for two centuries have regarded the opportunity of cross-examination as an essential safeguard of the accuracy and completeness of testimony, and they have insisted that cross-examination is a right and not a mere privilege. This right is available, of course, upon the taking of depositions, as well as on the examination of witnesses at the trial. This premise that the opportunity of cross-examination

²The Coast Guard transcript was offered by claimants to prove that Mr. Jensen testified substantially the same at the Coast Guard investigation, where there was cross-examination, as he did under direct examination by claimants at his deposition. [Tr. pp. 674, 675]. We submit that the evidence proves to the contrary, as will be noted below.

is an essential safeguard is the principal justification for the exclusion generally of hearsay statements, and for the admission as an exception to the hearsay rule of reported testimony taken at a former hearing when the present adversary was afforded the opportunity to cross-examine . . . What are the consequences of a denial or failure of the right? There are several common situations . . . The fourth situation is that of the death of the witness before the cross-examination. Here again it is usually said that the party thus deprived of the cross-examination is entitled to have the direct testimony stricken, unless, presumably, the death occurred during a postponement of the cross-examination consented to or procured by him." *Hornbook on Evidence*, McCormack—page 40.

Absent cross-examination, the Jensen deposition was inadmissible hearsay. *Rutherford v. Geddes*, 4 Wall. 220, 18 L. Ed. 343 (1867). Absent a showing by claimants that Appellant had the opportunity to cross-examine, or that the responsibility for having failed to cross-examine was in some way attributable to Appellant, the deposition of Jensen should have been suppressed. An analysis of the cases involving the issue of admissibility of a deposition where no cross-examination took place reveals that in each of the cases where the testimony was admitted, except the *Inland* case, the objecting party had conducted its examination. See for example, *Derewecki v. Penn. R.R.*, 353 F. 2d 436 (3rd Cir. 1965); *Frederick v. Yellow Cab Co.*, 200 F. 2d 483 (3rd Cir. 1952); *Paul v. American Surety Company of New York*, 18 F.R.D. 68 (1965); *Rosenthal v. Peoples Cab Company*, 26 F.R.D. 116 (1960); *Weiss v.*

Weiner, 10 F.R.D. 387 (1950); and see *Mid-City Bank & Trust Company v. Reading Company*, 3 F.R.D. 320 (1944), where the court at page 322 said:

“The rules of evidence were designed to obtain the truth. They are intended to exclude testimony that is unreliable, such as hearsay, and testimony that is false and dishonest. The safeguards set up to combat testimony of this character are the oath and the right of the adverse party to cross-examine the witness. The omission of either of these tests of testimony will usually render the testimony objectionable.”

The suppression of the deposition is of critical importance here. Mr. Jensen's deposition testimony concerning the characteristics of the fathometer which he observed formed the basis for his opinion that the fathometer was defective.

There was no opportunity to examine the witness concerning his knowledge or lack of knowledge of the other factors which can cause the flashing phenomenon he observed. As an example, claimant's fathometer expert, Mr. Harrison, testified that multiple flashing which could not be adjusted away could be caused by a motor or interference of some kind from the vessel itself [Tr. pp. 714-716]. Captain Slack testified that the condition could have been caused by a school of fish or turbulence of the sea [Tr. p. 500].

An examination of the deposition reveals that Jensen testified that he was the 8 to 12 watch officer (the grounding occurred during his watch) and he did not use the fathometer because “the last time I used it she was spinning around the dial.” [Tr. p. 665]. Further

examination by claimants revealed that Mr. Jensen was referring to the red light which appears on the face of the fathometer dial. Mr. Jensen further testified that he tried to adjust the gain control to prevent the red light from appearing all over the face of the dial but he was unsuccessful [Tr. pp. 670-672].

Contrary to claimants' contention that the Coast Guard testimony of Mr. Jensen was substantially identical with his deposition testimony, in fact, at the Coast Guard hearing the witness stated that the fathometer could not be expected to work well in water of the depth where he had concluded that it was defective! The testimony is as follows: [Coast Guard Ex. "I", p. 228]

"Q. . . . How much water would you have had under the keel on the Inland Sea, you figure? Was it ten feet? A. I would say approximately that, or fifteen. Ten, fifteen feet. That's just for the small distance while we changed the pilot.

Q. Would the fathometer ordinarily work in that little depth of water under the keel? A. Not very good."

Of major significance is the time factor. The Coast Guard hearing was before Mr. Jensen's deposition. At the Coast Guard hearing, Appellant had an opportunity to cross-examine and the net effect of Mr. Jensen's testimony was undamaging regarding the condition of the fathometer. Thereafter, Mr. Jensen's deposition was taken and a lack of opportunity to cross-examine ensued. Neither Mr. Jensen nor any ship's officer had interests

in common with Appellant. The Coast Guard investigation was, among other things, aimed at determining whether action should be taken against their licenses or that of any of them. The investigation was not a substitution for Appellant's lack of cross-examination at the deposition. It was apparent from the beginning that Appellant's defense to the present action would be based upon "negligent navigation and management," the exception of the Carriage of Goods by Sea Act provided for at U.S.C. 46, Section 183. The success of this defense meant proof of negligence by one or more of the ship's officers. Cross-examination of the deposition testimony was, therefore, essential in order for this testimony to avoid the bar of the hearsay rule. The incomplete deposition gives the reader the feeling that Mr. Jensen would have used this equipment but for his feeling of its defective condition. The unmistakable conclusion from the complete Coast Guard transcript is that Mr. Jensen was far too busy on the wing of the bridge looking for "discolored water." [Coast Guard Ex. "I", p. 210]. After 2000 hours, he was on the port wing of the bridge "all of the time." [Ex. "I", pp. 210, 229]. The Captain was in and out of the chart room [Ex. "I", p. 245]. It was the Captain who was on the bridge during Jensen's watch until the grounding and who testified that he did not consider using the fathometer because "I didn't think the ship was in that shallow of water to start with. Secondly, I wasn't thinking." [Tr. p. 153].

Further, the Court's conclusion that Jensen would have used the fathometer on the right of the stranding but for the fact that he believed it was inoperable is based upon a single leading question propounded by counsel for Appellee in his deposition and which did not specifically relate to the time of the stranding [Tr. p. 673]. On the other hand the Coast Guard transcript [Ex. I] ascribes Jensen's failure to use the fathometer to other reasons. For example, at page 293 of that transcript was the following exchange:

"Q. Why didn't you turn the fathometer on?

A. Well, looking at the chart, that's only a mile and a half from the shoreline there before we got fifty feet—

Q. Fathoms. A. Oh, fathoms, pardon me, and that goes kind of steep from the shoreline.

Q. Yeah but if you have your fathometer on, you would have picked up that 50 fathom and knew you were getting into bad water wouldn't you? A. Well,—"³

³The last question asked of Jensen was never answered and the examination then moved to another point. Later in Jensen's Coast Guard testimony, at page 251, the following sequence took place:

"Q. What was the main reason for not using the fathometer? A. Well, it was out of order, in my opinion.

Q. It was out of order in your opinion? A. Yes Sir.

Q. If it was in working order, could it have prevented this casualty? A. Due to the short distance between the shoreline and—I would say that if it had been working 100 percent, I mean, in perfect order, probably, but it was such a short distance from the shoreline and we have—

Q. What's the capacity of the fathometer? How deep would it read? A. I believe it's 200 fathoms.

Q. How far is the 200 fathom line off Santa Rosa

In view of this testimony the Coast Guard transcript standing alone could not support the Court's Findings of Fact 4 [R. 846]. It was therefore critical that Appellant be given an opportunity to cross-examine Jensen with respect to this subject; the prejudice to Appellant from lack of cross-examination on this subject is made more vivid, not less, by Jensen's Coast Guard testimony.

In summary then, the testimony of Jensen should be stricken as it was inadmissible hearsay. Appellant's lack of opportunity to cross-examine was clearly prejudicial as the Jensen testimony is the only basis for a casual connection between the fathometer and the stranding.

Island? A. It's—200 that's approximately—that's the 200 fathom (indicating on the chart), about 11 miles.

Q. About 11 miles. How long would it take the vessel to cover 11 miles? A. At that speed, about 35 minutes, approximately.

Q. Or, a little longer? A. A little longer, yeah."

Finally, at page 252 of the Coast Guard Transcript the following exchange:

"Q. Do you know for sure whether the fathometer was in working condition or not? You stated that it didn't perform satisfactorily in shallow water. Would it perform satisfactorily in deep water, do you know? A. No, I doubt that.

Q. What— A. In fact I didn't try it out after the Inland Sea experience.

Q. So it might have worked alright in deep water, then? A. Anyway, I found out, just like I mentioned in the Inland Sea, well it didn't work so I told them, 'well, it's just plain out of order'".

III.

Appellant Is Entitled as a Matter of Law to Exoneration for Cargo Loaded Prior to December 25, 1961.

The trial court's judgment denying Appellant both exoneration and limitation as to all cargo carried from the Far East is on its face erroneous with respect to that cargo loaded prior to December 25, 1961, regardless of the court's decision with respect to the other issues on this Appeal. The court found in Finding Two [R. 844] that cargo was loaded at Nagoya, Japan, on December 22 and 23, and at Kobe, Japan, on December 24, 1961. Claim for damages and/or loss of this cargo has been made in this proceeding. The precise cargo involved, and the value thereof, has not yet been ascertained in view of the bifurcation of this matter for trial with the damage issue left for a subsequent hearing. It is clear, however, from the court's remaining findings, and in particular, Finding Four [R. 846], Finding Five [R. 847], and Finding Eleven [R. 850], that but for Captain Patronas' negligence in failing to repair or check the fathometer after notification of uncertainty as to its condition on December 25, 1961 (after departure from Kobe, Japan), exoneration would have been granted under the provisions of 46 U.S.C. § 1304 (2) relating to negligent navigation. Thus at a minimum Appellant is entitled to exoneration for loss or damage to the cargo loaded prior to that time. The judgment and Findings of Fact and Conclusions of Law should be modified, even if this court does not reverse the denial of exoneration generally, or of limitation, to grant exoneration to Appellant with respect to such of that cargo loss or damage which occurred to cargo loaded prior to the vessel's departure from Kobe on December 25, 1961.

IV.

Based on the Lower Court's Findings, Limitation of Liability Should Have Been Granted as a Matter of Law.

A. Introduction.

The critical portion of the court's Findings and Conclusions with respect to limitation of liability is Finding Six, "WATERMAN'S PRIVACY, FAULT AND KNOWLEDGE" [R. 848].⁴ Analytically this finding breaks down as follows:

(1) Appellant had an obligation to exercise due diligence to make the CHICKASAW seaworthy at Far East ports;

(2) The responsibility of fulfilling this obligation, with respect to repairs of navigational equipment, was delegated to the vessel's master Captain Patronas;

(3) Captain Patronas was negligent in fulfilling this duty because of his failure to take action regarding the fathometer after December 25, 1961; and

(4) Since Appellant has no supervisory or managerial personnel in the Far East, but had delegated responsibility regarding repairs to Captain Patronas, his negligence in carrying out these duties is imputed to Appellant which therefore had privity and knowledge of his negligence.

The conclusion (point 4 above) is clearly predicated upon the proposition that for the purposes of the Limitation of Liability Statute *Appellant* had a general, non-

⁴Conclusion of Law 3 stating, "Said unseaworthiness existed with the privity and knowledge of petitioner Waterman Steamship Corporation." is merely the ultimate conclusion drawn from the legal propositions stated in and implicit in Finding of Fact Six.

delegable duty to exercise due diligence to make the CHICKASAW seaworthy at all ports in the Far East. This is an erroneous legal proposition, without authority, either legislative or judicial, resulting from a confusion of Cogsa concepts and Limitation of Liability concepts. A clear understanding of the relationship between Limitation of Liability and Cogsa compels the conclusion that what is a general non-delegable duty under Cogsa is not such a duty under the Limitation of Liability Statutes. Even when exoneration under Cogsa is denied for a failure to exercise due diligence to make a vessel seaworthy, limitation must be granted if the failure is that of nonmanagerial, nonsupervisory personnel, a category that clearly includes a vessel's master.

These points will be further elaborated first, by examining the history of Limitation of Liability and its relationship to Cogsa (and the preceding Harter Act), second, by discussion of the more recent authorities dealing with the effect of delegation of responsibility to a vessel's master upon Limitation of Liability, and finally, by explanation of the proper relationship between Cogsa and Limitation of Liability.

B. Historical Analysis.

Prior to the enactment of the Limitation of Liability Statutes in 1851 (which was also prior to the enactment of the Harter Act, 46 U.S.C. § 190 *et seq.*, in 1893 and Cogsa in 1936) the general law of maritime carriage made the public carrier of goods by sea essentially an insurer of safe carriage, except for the loss of damage that was caused by act of God or public enemy, inherent vice of the goods, or fault of the shipper. The shipper's only burden of proof was to

show delivery of its goods to the carrier in good order and either non-delivery or re-delivery in bad order. When Bills of Lading came into use, shipowners began setting out contractual exceptions in addition to the common law exceptions. Ultimately these contractual exceptions, when accepted by the courts, eliminated liability even for unseaworthiness and negligence. The concept of due diligence was irrelevant to the question of the shipper of cargo's recovery.⁵ Either the shipowner was liable as a common carrier in the absence of exculpation in the bills of lading or it was not liable as a result of such exculpation.

At this stage in the development of American law of maritime carriage it was not entirely clear whether or not that law, without legislation, incorporated the doctrine of limitation of liability as developed in other maritime nations and as represented by statute of England. This question was resolved against the incorporation of the limitation doctrine in the case of the *LEXINGTON*, 6 Howard 342, 12 L. Ed. 456 (1848). This decision, which imposed full liability for the loss of bullion on board the *LEXINGTON* when it burned and sank, resulted in the enactment of the Limitation of Liability Statutes in 1851. These statutes were passed in substantially the same form as they presently exist with subsequent modifications principally dealing with the loss of life situation.

Historically the Limitation of Liability Statutes evolved out of prior maritime, as opposed to civil, law developed for the purpose of insulating the vessel owner

⁵Except occasionally insofar as it bore on the public policy question of the validity of exculpatory clauses in bills of lading.

from the acts of negligence of the master of the vessel by limiting the owner's liability to the value of the vessel. The Supreme Court, in *Norwich and N.Y. Trans. Co. v. THE WRIGHT*, 13 Wall. 104, 20 L. Ed. 585 (1872), the first Supreme Court case extensively analyzing this country's Limitation of Liability Statute, summarized this history as follows:

“ . . . it originated in the maritime law of modern Europe; that whilst the civil, as well as the common law, made the owner responsible to the whole extent of damage *caused by the wrongful act or negligence of the master or crew*, the maritime law only made them liable (if personally free from blame) to the amount of their interest in the ship. So that, if they surrendered the ship, they were discharged. . . . The maritime law, as codified in the celebrated *French Ordonnance de la Marine*, in 1681, expressed the rule thus: ‘The proprietors of vessels shall be responsible for the acts of the master, but they shall be discharged by abandoning the ship and freight’. Valin in his commentary on this passage, lib. 2 tit. 8, art. 2, after specifying certain engagements of the master which are binding on the owners, without any limit of responsibility, such as contracts to the benefit of the vessel, made during the voyage (except contracts of bottomry) says: ‘With these exceptions, it is just that the owners shall not be bound for the acts of the *master*, except the amount of the ship and freight.’ ” (emphasis added).

That this historic rationale of insulating the vessel owner from the acts of negligence of the master and crew was the purpose of the American Limitation of

Liability Statute was made clear in one of the earliest Supreme Court cases decided under that statute, *Walker v. The Western Transportation Co.*, 3 Wall. 150, 18 L. Ed. 172 (1866). In that case the question presented to the court for decision was stated as follows:

“1. Is the owner of a vessel used in the trade on the Lakes, liable, independent of contract, for a loss by fire which occurs without any design or neglect of its owner, although it may be traced to negligence of some of the officers or agents having charge of the vessel?”

The court answered that question as follows:

“The language of the 1st section is, that no owner or owners of any ship or vessel shall be liable to answer for any loss or damage, which may happen by reason or means of fire on board such ship or vessel, ‘unless such fire is caused by the design or neglect of such owner or owners.’ The owners are here released from liability for loss by fire, in all cases not coming within the exception. The exception is of cases where the fire can be charged to the owner’s design, or the owner’s neglect.

“When we consider that the object of the Act is to limit the liability of owners of vessels, and that the exception is not in terms of negligence generally, but only of negligence of the owners, it would be a strong construction of the Act, in derogation of its general purpose, to hold that this exception extends to the officers and crews of the vessel as representing the owners.

“If, however, there could be any doubt upon the construction of this section standing alone, it is removed by a consideration of the Sixth Section of

the same Act. [now Section 187]. This enacts that nothing in the preceding Sections shall be construed to take away or affect the remedy to which any party may be entitled against the master, officers, or mariners of such vessel, for negligence, fraud or other malversation. This implies that it was the purpose of the preceding Sections to release the owner from some liability for conduct of the master and other agents of the owner, for which these parties were themselves liable, and were to remain so; and that is stated to be their negligence and fraud.

“We are, therefore, of the opinion that in reference to fires occurring on that class of vessels to which the Statute applied, the owner is not liable for the misconduct of the officers and the mariners of the vessel in which he does not participate personally.”

The *Walker* case *supra*, involved the Fire Statute section (Section 182) of Limitation of Liability Statute; *Norwich and N.Y. Trans. Co. v. THE WRIGHT*, *supra*, made it clear that the position of the master was the same in cases involving Section 183. The *Norwich* case was the first interpreting those portions of the Limitation Act which require the establishment of a Limitation Fund. In interpreting that Section the Court said:

“The Section [section 183] as constructed limits the ship-owners’ liability in three classes of damage or wrong happening without their privity, and by the fault or neglect of the master or other persons on board, viz: 1, damage to goods on board;

2, damage by collision to other vessels and their cargo; 3, any other damage or forfeiture done or incurred.

“In view of the fact the limited liability of ship-owners was, by the general maritime law, *extended to all acts of the master* except contracts for the benefit of the ship, and in most places even to these; and to the fact that the English Statutes expressly extend it to cases of collision as well as to injuries to cargoes, we see no reason why the fair natural construction should not be given to the Act of 1851, which makes an equally broad application of the rule, and there is nothing in the reason of the thing that should lead us to evade such a construction.” (emphasis added).

See also *Craig v. Continental Insurance Co.*, 141 U.S. 638, 35 L. Ed. 886 (1891).

Thus at the time of the enactment of the Harter Act in 1893 the United States Limitation of Liability Statutes preserved the historic concept of immunization of the vessel owner from the negligence of the master or crew. It did not effect the general rules of liability between a shipper of cargo and a carrier by sea (with the exception of the case of loss by fire and loss of certain articles of high value in relationship to size, see 46 U.S.C. Sections 181 and 182) but simply provided a limitation to that liability in the event of a casualty of sufficient size to make the loss in excess of the “Limitation Fund”. The Limitation of Liability Statutes further were not limited to dealing with the

problems of carriage of goods by sea but dealt with loss and damage to other property and to personal injury as well. See *Norwich and N.Y. Trans. Co., v. THE WRIGHT*, *supra*.

The Harter Act, on the other hand, was specifically designed to deal with the limited problem of *liability* between the shipper of goods and the common carrier by sea. At this juncture the law with respect to a vessel owner's liability to cargo interests remained basically an all or nothing proposition; either the shipowner was, with few exceptions, absolutely responsible for damage to the cargo owner's goods while in his custody, or he was not responsible at all as a result of exculpatory causes in the Bills of Lading. The Harter Act was designed to effect a compromise between these two positions. It invalidated contractual clauses in Bills of Lading for public carriage by sea purporting to exempt the owner from liability for negligence or unseaworthiness, but expressly permitted Bills of Lading clauses exonerating the owner from liability for the result of negligent navigation or management of the vessel, if the shipowner had used due diligence to make the vessel seaworthy. Under the Harter Act the shipowner, once cargo established its *prima facie* case, had to prove not only that the loss or damage resulted from negligent navigation or management, but also that it used due diligence to make the vessel seaworthy in all respects, whether or not related to the cause of loss. The *ISIS*, 290 U.S. 333, 54 S. Ct. 162 (1933). Then in 1924, an international convention agreed upon the "Hague Rules", governing the carriage of goods by sea and based upon the example of the Harter Act. These rules were ultimately adopted by the major mari-

time nations (with some variations), the United States adopting them in 1936 as Cogsa.⁶

The mediating mechanism through which both the Harter Act and Cogsa effected a compromise between the position of the shipowner under the common law of carriage of cargo and its position under Bills of Lading exculpating it entirely for damage from any cause, was the concept of due diligence to make seaworthy. This concept incorporated into the determination of liability between shipowner and shipper a specialized negligence concept previously foreign to that relationship. However, both the Harter Act (in what is now Section 196 of that Act) and Cogsa (in what is now Section 1308 of that Act) expressly disclaimed any intent that those Statutes adjusting the concepts of liability between shipper and shipowner should affect any change in the Limitation of Liability provisions.⁷

⁶There are some important differences between the Harter Act and Cogsa. Specifically Cogsa added to negligent navigation and management of the vessel fifteen additional excepted causes for which shipowners would not be liable (Section 1304 (2) (b) through (q) and changed the burden of proof so that under Cogsa the shipowner, if it shows that the loss was in part caused by one of the specific exemptions (1304) (2) (a)-(b)) need only show due diligence to make the vessel seaworthy if the cargo owners show the loss to have been caused by unseaworthiness. *Firestone Synthetic Fibers Co. v. MS HERRON*, 324 F. 2d (2nd Cir. 1963). These differences, however, as important as they are for determination of the right of a shipowner to exoneration under the terms of the statute in question, are not relevant to the relationship between either the Harter Act and Cogsa on the one hand, and the Limitation of Liability Statutes on the other.

⁷Section 196 of the Harter Act provides as follows:

“Sections 190-195 of this title shall not be held to modify or repeal sections 181, 182 and 183 of this title, or any other statute defining the liability of vessel, their owners, or representatives.” And section 1308 of Cogsa provides:

“The provisions of this chapter shall not effect the rights

(This footnote is continued on the next page)

Despite this express disclaimer it was perhaps inevitable that the contention would be raised that the Harter Act and/or Cogsa created a general non-delegable duty on shipowners to use due diligence to make their vessels seaworthy prior to the commencement of the voyage, failing which they would be denied the benefits of the Limitation of Liability Statutes.

This precise problem was raised in *Earle & Stoddard v. Ellerman's Wilson Line*, 54 F. 2d 913 (1931), aff'd 287 U.S. 420, 77 L. Ed. 403 (1932). This case involved a claim for limitation of liability by the vessel owner under 46 U.S.C. Section 182 (the so called fire statute portion of the Limitation of Liability Act which, while utilizing different language than Section 183 is interpreted in identical fashion, *Consumers Import Co. v. Kabushiki Kaisha*, 133 F. 2d 781, 784 (2nd Cir.), aff'd 320 U.S. 249 (1940)). In the *Earle & Stoddard* case, the chief engineer of the vessel *Galileo* negligently placed a new supply of coal on top of old coal, then known to be heated, prior to the commencement of the voyage in question. Not long after departure, the coal was found to be aflame due to spontaneous combustion and the vessel ultimately sank with loss of the entire cargo. In answer to a libel brought by the cargo owners against the vessel owner, the vessel owner pleaded as a defense 46 U.S.C. Section 182. The District Court held Section 182 a valid defense for the libel and was affirmed by the Court of Appeals. That Court, in distinguishing the Supreme Court's opinion in the prior

and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of Sections 175, 181-183 and 183 (b)-188 of this title, or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the Limitation of Liability of the owners of sea-going vessels."

case of *Republic of France v. French Overseas Corp. (The Malcolm Baxter, Jr.)*, 277 U.S. 329 (1928) stated as follows:

“It will be noticed that the failure to exercise due diligence was referred to as that of the Respondent, the vessel owner. *Had it been only that of the vessel's master, the benefits of the Harter Act would have been lost, but not the benefits of the Limitation of Liability Act, under the authorities.* Sec. 483 (46 U.S.C.A. Section 183) permits limitation of liability for loss or damage to cargo caused ‘withot the privity, or knowledge of such owner.’ The phrase quoted has been construed to refer to some personal fault of the owner or his ‘higher representatives,’ and not to exclude limitation merely because of negligence on the part of the ship's officers. . . . We feel confident that the Supreme Court did not intend by this brief reference to the limitation statute to modify the long-established construction of the phrase ‘without the privity or knowledge of the owner.’ Unseaworthiness of a vessel has nothing to do with limitation of liability by the owner unless it exists with the owner's privity or knowledge. Lack of diligence to make the vessel seaworthy is therefore immaterial unless it is within the owner's privity of knowledge. Unless this be borne in mind, the use of the phrase ‘lack of diligence to make seaworthy,’ which under the Harter Act is not limited to the owner's personal failure in diligence, may well lead to confusion when applied to the limitation act. In the case of *The Malcolm Baxter, Jr.*, as appears from the decision of the District Court, 55 F.(2d) 312,

the vessel's hull had defects which an inspection would have disclosed, but the owner did not provide a suitable person to inspect the vessel, which it had purchased without any warranty of seaworthiness in the bill of sale. Hence the lack of diligence was the owner's, and the loss resulting from unseaworthiness was within the owner's 'privity.' So understood, the case is quite in line with earlier authorities. In the case at bar, however, the lack of diligence was that of the chief engineer, and the owner was not only not in privity with the engineer's default, but was found by the court to be free from personal neglect."

The Supreme Court also affirmed the *Earle & Stoddard* case. The cargo owners contended that the duty to use due diligence to make the vessel seaworthy prior to the commencement of the voyage is non-delegable and as the loss resulted from such a failure, limitation should not be granted. The Supreme Court dealt with that contention as follows:

"The fire statute, in terms, relieves the owners from liability 'unless such fire is caused by the design or neglect of such owner.' The statute makes no other exception from the complete immunity granted. The cargo-owners do not make the broad contention that the statute affords no protection to the vessel owner, if the fire was caused by unseaworthiness existing at the commencement of the voyage. Their contention is that it does not relieve the owner if the unseaworthiness was discoverable by due diligence. The argument is that the duty of the owner to make the ship seaworthy before starting on her voyage is non-delegable,

and if the unseaworthiness could have been discovered by due diligence, there was necessarily neglect of the vessel owner. . . .

“The cargo owners rely chiefly upon *International Nav. Co. v. Farr & B. Mfg. Co.*, 181 U.S. 218, 45 L.Ed. 830, 21 S.Ct. 591, and *THE WILDCROFT (W.J. McCahan Sugar Ref. Co. v. THE WILDCROFT)*, 201 U.S. 378, 50 L.Ed. 794, 26 S.Ct. 467. Those cases involve the construction of the Harter Act; and the language there employed is different. The Harter Act provides in Section (3) that the vessel owner shall not be liable if he ‘shall exercise due diligence to make the said vessel in all respects seaworthy.’ (Feb. 13, 1893, 27 Stat. at L. 455, Chap. 105 U.S.C. Title 46, Sec. 192.) And under the Act the requirement of due diligence is not satisfied if there is negligence on the part of any of the ship’s employees. *International Nav. Co. v. Farr & B.Mfg. Co.*, *supra*. But the Act does not purport to create any general duty on the part of shipowners. Its requirement of due diligence is imposed as a condition of securing immunity from liability for certain kinds of losses, like those due to errors in navigation or management. But the provisions of the Harter Act do not refer to liability from losses arising from fire is made clear by section (6), which declares that the act ‘shall not be held to modify or repeal §§ 4281, 4282 and 4283 of the revised statutes’, § 4282 being the fire statute. The Courts have been careful not to thwart the purpose of the fire statute by interpreting as ‘neglect’ of owners the breach of what in other connections is held to be a non-delegable duty.”

In 1935 not long after the Supreme Court in *Earle & Stoddard* rejected the attempt to incorporate the Harter Act and Cogsa due diligence standard into the “privity or knowledge” standard of the limitation statutes, the first major set of amendments to the Limitation of Liability Statutes was enacted. As ultimately enacted these amendments did not effect the rights of the cargo claimants under the Limitation of Liability Act; however, an attempt was made to expand the meaning of “privity or knowledge”, to include the “privity or knowledge”, and, of course negligence, of the master of a vessel at and prior to the commencement of the voyage. Had this attempt been successful it would have had the effect of partially incorporating the non-delegability concept of the Harter Act and Cogsa into Limitation of Liability Statute as it effects cargo claims by making the shipowner responsible for the privity or knowledge or fault of the master. The legislative history of these amendments, therefore, is of considerable interest in analyzing the proper rule with respect to imputation of the negligence of the master of a vessel for purposes of preventing limitation of liability. It shows a rejection by Congress of the concept of imputing the master’s negligence to the owner in cargo cases.

The original Bill presented to Congress was house resolution 4550 introduced by Congressman Sirovich. That Bill provided, in part, as follows:

“181. Privity or knowledge—the privity or knowledge of the master of a vessel, or of the super-

vising or managing agent of the owner or owners thereof, shall be deemed the privity or knowledge of the owner or owners", Hearing On House Resolution 4550 before Committee on Merchant Marine Fisheries 74th Cong. First. Sess. Page 2.⁸

Had the section as originally proposed been enacted, the result reached by the trial court in this matter, assuming for the purposes of argument the correctness of the court's finding with respect to Patronas' negligence would have been correct. The master was negligent, therefore under the proposed section the owners would have privity or knowledge.

Most of the two hundred plus pages of the hearing on House Resolution 4550 focused on precisely this provision with respect to privity or knowledge. During the course of the hearings, the American Steamship Owners' Association proposed an alternative bill for consideration of the committee, stressing the difference between its bill and the original bill on the question of privity or knowledge; the Association's proposal leaving the privity or knowledge language of the original statute of 1851 unchanged.

⁸While the proposed amendment added, in addition to the master, the supervising or managing agent, as parties whose privity or knowledge would be imputed to the owner, Congress recognized that the prior case law indicated the privity or knowledge of the supervising or managing agent of the owners would be imputed to owner without such amendment and that the only new facet added by this proposed amendment would be the imputation of the privity or knowledge of the master. See House Report No. 2517, the Committee of Merchant Marine and Fisheries, 74th Cong. Second Sess. at pages 2 and 5.

As a result of this debate the form of the amendment with respect to privity and knowledge was modified. The final form of the bill was added as part of 46 U.S.C. Section 183 and reads as follows:

“In respect of loss of life or bodily injury the actual privity or knowledge of the master of a seagoing vessel, or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.” (Emphasis added).

Thus the matter stood until the next year when both the original authors of the amendments and vessel owning interests proposed further modification and clarification of the Limitation of Liability Statutes. The basic proposal, in addition to adding some sections not relevant herein, was to divide 46 U.S.C. Section 183 into subsections to clarify the intent of the statute. One of the purposes in so doing was stated as follows; at page 2 of House Report number 2517, Committee On Merchant Marine and Fisheries, 74 Cong. Second Sess.:

“During the course of the hearings on the bill [House Resolution No. 9969], there were brought to the attention of the Committee certain ambiguities and uncertainties in the above quoted provisions of the 1935 Act [privity and knowledge provisions], as a result of which insurance rates on cargo vessels have increased between ten and fifteen percent. *It is the belief of the Committee that the committee amendments will make certain the manner in which the increased liability in respect of loss of life and bodily injury will oper-*

ate, and that such operation will not only to a greater extent increase the protection of the lives of persons traveling on vessels which sail the high seas, but also leave undisturbed the position which cargo claimants have had since the enactment in 1851 of the original Limitation of Liability Act." (emphasis added).

Thus the legislative history of the 1935 and 1936 amendments to the Limitation of Liability Statutes re-affirms the congressional intent to follow the historic rationale of Limitation of Liability Statutes by specifically rejecting an attempt to make the privity or knowledge of the master of a vessel the privity or knowledge of the owner with respect to cargo cases. The history also clearly reveals the legislative intention to limit the imputation of the privity or knowledge of the master specifically to cases involving loss of life and bodily injury.

Our excursion into the history of the Limitation of Liability Statutes demonstrates the following:

(1) The historic rationale of Limitation of Liability Statutes was the insulation of the owner of a vessel from the negligence of the master and crew members of that vessel;

(2) That the non-delegable duty of due diligence to make seaworthy first brought into the law relating to the carriage of cargo by sea by the Harter Act and Cogsas was not intended to modify in any way the rights and obligations of a vessel owner under the Limitation of Liability Statute; the Supreme Court expressly rejected an attempt to incorporate this non-delegable duty standard in the Limitation of Liability Act in the *Earle & Stoddard* case;

(3) That an attempt to amend the Limitation of Liability Act to bind the shipowner in cargo cases with the privity or knowledge or fault of the vessel's master was consciously rejected by the Congress with the intent of retaining in cargo cases the historic position of the shipowner/cargo claimants as set forth in (1) above.

C. The Master and the Case Law.

Analysis of the cases relating to imputation of the master's negligence to the shipowner in limitation of liability situations demonstrates that the historic rationale of the Limitation Act of insulating the shipowner from negligence of the master or crew has been carried forward up to the present in a variety of situations. These same cases demonstrate a continuing rejection, based principally on the *Earle and Stoddard* case, of the concept that the non-delegable duty standards of the Harter Act and Cogsa are pertinent to Limitation cases.

In *The YUNGAY*, 58 F. 2d 352 (S.D.N.Y. 1931), a vessel stranded with loss of its entire cargo due to bad seamanship of the master, coupled with defective compasses. Exoneration was denied because of the condition of the compasses at the commencement of the voyage. The owner relied upon the master to repair the compasses prior to the start of the voyage. Limitation of liability was granted. The court first rejected cargo owner's claim that repair of the compasses was a non-delegable duty, saying:

"The Act would fail of its purpose, the encouragement of the business of navigation, if full liability could be visited upon owners through the creation and imposition on them of non-delegable duties."

The court then dealt with the question of imputing the master's negligence to owners as follows:

"In short, the proof indicates that the owner rested the duty of adjusting the compasses upon an agent [the master] who was believed by him, not without reason, to be competent to do the job. This being the case, the owner is entitled to limit his liability for loss occasioned by the agent's non-performance of the duty laid upon him."

See also *The ARIEL*, 33 F. 2d 573 (S.D.N.Y. 1940), at page 575.

In *Hartford Accident & Indemnity Co. v. Gulf Refining Co.*, 230 F. 2d 346 (5th Cir. 1956), the pilot, then acting as master of an integrated oil tow, negligently failed to fulfill his duty to ascertain that the flanges on the end of the discharge lines were secured prior to the commencement of the voyage. As a result, when the tow arrived at the port of discharge, an explosion ensued because of the fumes from one of the discharge lines which did not have a flange. The vessel owner pleaded the so-called fire statute portion of the Limitation of Liability Act as a defense to the cargo owner's claim for cargo damage. In the lower court where the defense of the fire statute was not raised, the court found in favor of the cargo owner. On appeal, the fire statute defense was raised and the Appellate Court held it a valid defense, subject to further testimony in view of the failure to raise the defense at the trial court, saying:

"It is settled law that unseaworthiness in itself does not constitute such neglect, and moreover, that to deny exemption the negligence must be that of the owner himself or his managing of-

ficers. Thus, while under the Harter Act, the negligence of a ship's employee is imputable to the vessel owner, under the fire statute it is not."

In *Petition of Kinsman Transit Company*, 338 F. 2d 708 (2nd Cir. 1964), the master of a vessel was delegated the duty of securing it for the winter lay-up on the Great Lakes. He did so negligently and, as a result, the vessel broke loose and drifted downstream, damaging other vessels and a bridge. The court said, in dealing with the distinction between exoneration and limitation, at pages 715 and 716:

"They [owners] were not negligent in assigning the task to Davies [the master], whose competence was established. Davies was not 'sufficiently high' under the authorities cited below. *His knowledge is imputed to the corporation on the issue of exoneration, but that is precisely what the statute forbids on the issue of limitation*" (Emphasis added).

In *Moore-McCormack Lines, Inc. v. Armco Steel Corp.*, 272 F. 2d 873 (2nd Cir. 1959), owners of a vessel delegated to the master the responsibility for supervising stowage of bulk cargo in foreign ports and, in particular, the responsibility for assuring that the stowage was such as not to endanger the safety of the vessel. The master negligently performed this duty, prior to the commencement of a voyage at Victoria, Brazil, with the result that the vessel departed unseaworthy and unstable. When the vessel encountered heavy seas, it floundered and finally overturned and sank with loss of life and total loss of cargo. A petition for exoneration from or limitation of liability for

the loss of life and cargo was filed by owners. At the trial court, exoneration and limitation were denied both as to loss of life and cargo damage. The Court of Appeals affirmed denial of exoneration with respect to both cargo and loss of life because of the negligence of the master, and further denied limitation with respect to loss of life because of the master's negligence in view of 46 U.S.C. Section 183 (e) imputing, in case of loss of life or bodily injury *only*, the privity or knowledge of the master at or prior to the commencement of the voyage to the owners. The Court of Appeals, however, reversed the District Court on the question of limitation of liability with respect to cargo damage. The appellate court held that the vessel owners had properly delegated to the master the duty of insuring proper stowage in foreign ports and that a failure of the master in this regard did not charge the owners with privity or knowledge with respect to cargo loss. See also *American Tobacco Co. v. The KAPINGO HADJIPATERA*, 81 F. Supp. 438 (S.D.N.Y. 1948).

Finally, in *Albina Engine & Mach. Works v. Hershey Chocolate Corp.*, 295 F. 2d 619 (9th Cir. 1961), owner's vessel while in port in Portland required repairs to a ladder in the No. 5 hold. Owners, Luckenbach, engaged an independent contractor, Albina, to make these repairs. The port engineer delegated to the vessel's chief engineer the duty of connecting the ship's water system with a fire hydrant on the wharf since a portion of the vessel's fire extinguishing line had also been removed for repairs. This duty in turn was delegated from the chief engineer to an assistant engineer. The assistant engineer negligently failed to perform the duty. During the process of repairing the

ladder, a welding spark ignited cargo on the vessel causing substantial damage. Cargo owners filed suit against both the shipowner and the independent contractor. The shipowner pleaded as a defense the fire statute portion of the Limitation of Liability statutes and filed an action against the independent contractor for indemnity. The trial court upheld the fire statute defense against the cargo owners, found in favor of the cargo owners against the independent contractor, and denied the independent contractor's claim for contribution from the shipowner. On appeal by the independent contractor, the basic question was whether or not the lower court was correct in finding no liability on the part of the shipowner to cargo as a result of the fire statute and thus no basis for contribution by the shipowner. This court dealt with the problem as follows:

“As to cargo, the District Court held Luckenbach to be free from liability under 46 U.S.C. § 182, commonly known as the ‘fire statute,’ by the terms of which a ship's owner is freed from liability for fire damage to its cargo ‘unless such fire is caused by the design or neglect of such owner.’

“It is well established within the meaning of this statute that ‘neglect of such owner’ refers to the neglect of the owner personally or, in the case of a corporate owner, to the neglect of the managing officers and agents as distinguished from that of the master or other members of the crew or subordinate employees. *Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo*, 1943, 320 U.S. 249, 64 S.Ct. 15, 88 L.Ed. 30.

“Albina contends that the neglect of Luckenbach was attributable to its port engineer and its marine superintendent and that both of these persons were managing officers and agents.

“As to the port engineer, the District Court found that he had arranged with the ship’s chief engineer for the providing of an alternate fire line and that the responsibility for the ship’s failure to provide such a line lay with that ship’s officer and not with any managing officer of the company. The court found that the delegation of this task was proper. As to the marine superintendent, whom Albina contends had responsibility for clearing the hold, the District Court found him ‘a mere subordinate employee’ and not a managerial officer.

“We are satisfied that these findings cannot be held clearly erroneous. The fire statute then applied to free Luckenbach from liability to cargo.”

It is clear, therefore, that the continuing and consistent interpretation of the Limitation of Liability Acts has been and remains that a corporate vessel owner is entitled to limit its liability if, assuming a failure to exercise due diligence to make seaworthy to have been established, it is found that such negligence was not that of a managing or supervising representative of the vessel owner. The test was clearly stated by the Supreme Court in *Coryell v. Phipps*, 317 U.S. 406, 87 L. Ed. 363 (1943), when the court said:

“In those cases [involving corporate shipowners] it is held that liability may not be limited under the statute where the negligence is that of an executive officer, manager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred. . . . A corporation necessarily acts through human beings. The privity of some of those persons must be the privity of the corporation else it could always limit its liability. Hence, the search in those cases to see where in the managerial hierarchy the fault lay.”

D. The Proper Relationship Between Limitation of Liability and the Due Diligence to Make Seaworthy Standard of the Harter Act and Cogsa.

As has been demonstrated, for the purposes of the Limitation of Liability Act there is no general non-delegable duty upon the shipowner to utilize due diligence to make its vessel seaworthy at the commencement of its voyage. Thus Finding of Fact 6 in the instant action relating to Appellant's privity, fault and knowledge under the Limitation of Liability Statutes is predicated on an erroneous legal concept when it commences by stating:

"It was the Waterman Steamship Company's obligation to exercise due diligence to make the SS CHICKSAW seaworthy at the commencement of the voyage to the Far East."

This is not to say, however, that there is no relationship between a denial of exoneration under Cogsa and Limitation of Liability in an action such as the instant one combining both elements in the same law suit. As is demonstrated by *States Steamship Co. v. United States*, 259 F. 2d 459 (9th Cir. 1958), such a relationship does exist. This relationship is a purely procedural one arising from the fact that both limitation of liability and exoneration under Cogsa are in turn related to the concept of unseaworthiness.

The relationship between limitation of liability and unseaworthiness of the vessel comes not from special duties created by Cogsa but from the portion of the Limitation of Liability Act requiring a denial of limitation if the loss is with the privity or knowledge of owners. In this context owners means simply the

managerial or supervisory personnel of owners, *Moore McCormack v. Armco Steel Corp.*, 272 F. 2d 873, 876 (2nd Cir. 1959). Thus a proper statement of the relationship between vessel unseaworthiness and limitation of liability is that, in the case of a corporate owner, if personnel at the managerial level have either actual knowledge of an unseaworthy condition or knowledge of facts that give notice of probable unseaworthiness, thus giving rise to a duty to act or inquire, and there is a failure on said personnel's part to act or inquire, limitation will be denied.

The relationship between Cogsa and unseaworthiness of the vessel, on the other hand, does stem from a special, non-delegable, statutory, duty on the shipowner to exercise due diligence to make its vessel seaworthy at and prior to the commencement of the voyage.

Thus the relationship between denial of exoneration under Cogsa and limitation of liability when both are raised in the same law suit is simply stated:

If exoneration is denied because of a failure to exercise due diligence to make the vessel seaworthy prior to the commencement of the voyage, it is then incumbent upon the shipowner, in order to obtain the benefits of the Limitation of Liability Statute, to demonstrate that the failure to exercise due diligence was that of the master or officers of the vessel or of some non-supervisory, non-managerial shoreside personnel. If the shipowner succeeds in establishing this fact then limitation must be granted despite a denial of exoneration. See *Port of Pasco v. Pacific Inland Navigation Co., Inc.*, 324 F. 2d 593 (9th Cir. 1963), at page 599.

E. The Negligence of Captain Patronas Should Not Be Imputed to Appellant to Deny Limitation of Liability.

In all of the lower court's Findings of Fact and Conclusions of Law in this action, only one negligent act is found. That act was the failure of Captain Patronas to exercise due diligence to make the fathometer seaworthy when, with knowledge of uncertainty with respect to its condition, he took no steps to repair or check it [Finding of Fact (5) R. 847]. Thus, limitation of liability could properly be denied only if Captain Patronas' negligence under the law is imputed to Appellant. Finding of Fact (6) R. 848 makes it explicit that no supervisory or managerial personnel were involved in Captain Patronas' negligence. It is clear that under the law Patronas' negligence is not imputed to Appellant to deny limitation of liability. The "search . . . to see where in the managerial hierarchy the fault lay" (*Coryell v. Phipps, supra*) ends with Captain Patronas. Paraphrasing the Second Circuit *In Petition of Kinsman Transit Co., supra*, Patronas was not sufficiently high. His knowledge is imputed to the corporation on the issue of exoneration, but that is precisely what the statute forbids on the issue of limitation.

V.

Conclusion.

We respectfully submit that for the foregoing reasons the decision of the District Court should be reversed.

GRAHAM & JAMES,
LEO J. VANDER LANS,
DON A. PROUDFOOT, JR.,

*Attorneys for Appellant Waterman
Steamship Corporation.*

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DON A. PROUDFOOT, JR.

APPENDIX.

Table of Exhibits.

Exhibit (Exhibits 1 through 111 were offered and received as joint exhibits of claimants and petitioner.)		
1	Joint Exhibit 1 Safety Equipment Issued November 11, 1960	Tr. 22 Tr. 22
2	Joint Exhibit 2 Safety Radio Certificate	Tr. 22 Tr. 22
3	Joint Exhibit 3 Coast Guard Certificate of Inspection Issued November 11, 1960	Tr. 22 Tr. 22
4	Joint Exhibit 4 Hull Inspection Book	Tr. 22 Tr. 22
5	Joint Exhibit 5 International Load Line Certificate-December 5, 1961	Tr. 22 Tr. 22
6	Joint Exhibit 6 Vessel Inspection Record	Tr. 22 Tr. 22
7	Joint Exhibit 7 Standing Orders	Tr. 22 Tr. 22
8	Joint Exhibit 8 Message	Tr. 22 Tr. 22
9	Joint Exhibit 9 Message	Tr. 22 Tr. 22
10	Joint Exhibit 10 Message	Tr. 22 Tr. 22
11	Joint Exhibit 11 Message	Tr. 22 Tr. 22
12	Joint Exhibit 12 Message	Tr. 22 Tr. 22
13	Joint Exhibit 13 Message	Tr. 22 Tr. 22
14	Joint Exhibit 14 Coast and Geodetic Survey Chart No. 5202 (copy)	Tr. 22 Tr. 22
15	Joint Exhibit 15 Coast and Geodetic Survey Chart No. 5002	Tr. 22 Tr. 22
16	Joint Exhibit 16 Message	Tr. 22 Tr. 22

	Exhibit	Identified	Received
17	Joint Exhibit 17 Message	Tr. 22	Tr. 22
18	Joint Exhibit 18 Message	Tr. 22	Tr. 22
19	Joint Exhibit 19 Message	Tr. 22	Tr. 22
20	Joint Exhibit 20 Message	Tr. 22	Tr. 22
21	Joint Exhibit 21 Message	Tr. 22	Tr. 22
22	Joint Exhibit 22 Mackay Radio Instruction Book	Tr. 22	Tr. 22
23	Joint Exhibit 23 Pilot Chart	Tr. 22	Tr. 22
24	Joint Exhibit 24 Diagram of Fathometer Dial	Tr. 22	Tr. 22
25	Joint Exhibit 25 Sounding Book	Tr. 22	Tr. 22
26	Joint Exhibit 26 Rough Deck Log No. 2 Voyage No. 129	Tr. 22	Tr. 22
27	Joint Exhibit 27 Smooth Deck Log No. 1 Voyage No. 129	Tr. 22	Tr. 22
28	Joint Exhibit 28 Smooth Deck Log No. 2 Voyage No. 129	Tr. 22	Tr. 22
29	Joint Exhibit 29 Smooth Engine Log No. 1 Voyage No. 129	Tr. 22	Tr. 22
30	Joint Exhibit 30 Smooth Engine Log No. 2 Voyage No. 129	Tr. 22	Tr. 22
31	Joint Exhibit 31 Smooth Engine Log No. 3 Voyage No. 129	Tr. 22	Tr. 22
32	Joint Exhibit 32 Rough Engine Log No. 3 Voyage No. 129	Tr. 22	Tr. 22
33	Joint Exhibit 33 Engine Bell Book	Tr. 22	Tr. 22
34	Joint Exhibit 34 Coast and Geodetic Survey Chart No. 5002	Tr. 22	Tr. 22

	Exhibit	Identified	Received
35	Joint Exhibit 35 RDF Calibration Table	Tr. 22	Tr. 22
36	Joint Exhibit 36 Mackay Form Calibration Chart and Curve	Tr. 22	Tr. 22
37	Joint Exhibit 37 Deviation Card for Standard Compass	Tr. 22	Tr. 22
38	Joint Exhibit 38 Azimuth Book	Tr. 22	Tr. 22
39	Joint Exhibit 39 Rough Deck Log No. 1 Voyage No. 128	Tr. 22	Tr. 22
40	Joint Exhibit 40 Rough Deck Log No. 2 Voyage No. 128	Tr. 22	Tr. 22
41	Joint Exhibit 41 Radio Beacon System Identification	Tr. 22	Tr. 22
42	Joint Exhibit 42 Hydrographic Office Chart 3000-6	Tr. 22	Tr. 22
43	Joint Exhibit 43 Coast and Geodetic Survey Chart No. 9000	Tr. 22	Tr. 22
44	Joint Exhibit 44 Hydrographic Office Chart 5799	Tr. 22	Tr. 22
45	Joint Exhibit 45 Pacific Coast and Pacific Island Light List, 1961	Tr. 22	Tr. 22
46	Joint Exhibit 46 Deck Bell Book	Tr. 22	Tr. 22
47	Joint Exhibit 47 Page from Deck Log Voyage No. 125	Tr. 22	Tr. 22
48	Joint Exhibit 48 Inside Front Cover Deck Log Voyage No. 125	Tr. 22	Tr. 22
49	Joint Exhibit 49 Diagram	Tr. 22	Tr. 22
50	Joint Exhibit 50 Smooth Deck Log Voyage No. 117	Tr. 22	Tr. 22

	Exhibit	Identified	Received
51	Joint Exhibit 51 Waterman "Instructions to Officers," 1947	Tr. 22	Tr. 22
52	Joint Exhibit 52 Coast and Geodetic Survey Chart No. 5202	Tr. 22	Tr. 22
53	Joint Exhibit 53 Rough Deck Log No. 1 Voyage No. 129	Tr. 22	Tr. 22
54	Joint Exhibit 54 Radar Log	Tr. 22	Tr. 22
55	Joint Exhibit 55 Radio Log	Tr. 22	Tr. 22
56	Joint Exhibit 56 Hull Inspection Book	Tr. 22	Tr. 22
57	Joint Exhibit 57 Motor Vehicle Inspection Record and Cover Letter	Tr. 22	Tr. 22
58	Joint Exhibit 58 Waterman Bulletin December 27, 1955	Tr. 22	Tr. 22
59	Joint Exhibit 59 Waterman Bulletin April 11, 1956	Tr. 22	Tr. 22
60	Joint Exhibit 60 Waterman Bulletin July 9, 1958	Tr. 22	Tr. 22
61	Joint Exhibit 61 Waterman Bulletin July 12, 1960	Tr. 22	Tr. 22
61	Joint Exhibit 62 Patronis' Service Record	Tr. 22	Tr. 22
63	Joint Exhibit 63 Letter dated October 30, 1961	Tr. 22	Tr. 22
64	Joint Exhibit 64 Patronis' Service Record	Tr. 22	Tr. 22
65	Joint Exhibit 65 RDF Calibration (Form)	Tr. 22	Tr. 22
66	Joint Exhibit 66 RDF Calibration Record (Form)	Tr. 22	Tr. 22
67	Joint Exhibit 67 RCA Work Order	Tr. 22	Tr. 22
68	Joint Exhibit 68 FCC Form 801	Tr. 22	Tr. 22
69	Joint Exhibit 69 Form F.E. 813	Tr. 22	Tr. 22

	Exhibit	Identified	Received
70	Joint Exhibit 70 FCC Form 807	Tr. 22	Tr. 22
71	Joint Exhibit 71 Letter signed by J. English November 3, 1961	Tr. 22	Tr. 22
72	Joint Exhibit 72 Waterman Bulletin November 30, 1956	Tr. 22	Tr. 22
73	Joint Exhibit 73 Waterman Bulletin April 9, 1957	Tr. 22	Tr. 22
74	Joint Exhibit 74 Waterman Bulletin February 14, 1958	Tr. 22	Tr. 22
75	Joint Exhibit 75 Waterman Bulletin August 12, 1958	Tr. 22	Tr. 22
76	Joint Exhibit 76 Waterman Bulletin October 29, 1958	Tr. 22	Tr. 22
77	Joint Exhibit 77 Waterman Bulletin March 13, 1959	Tr. 22	Tr. 22
78	Joint Exhibit 78 Waterman Bulletin November 12, 1959	Tr. 22	Tr. 22
79	Joint Exhibit 79 Waterman Bulletin December 17, 1959	Tr. 22	Tr. 22
80	Joint Exhibit 80 Waterman Bulletin January 7, 1960	Tr. 22	Tr. 22
81	Joint Exhibit 81 Waterman Bulletin April 6, 1960	Tr. 22	Tr. 22
82	Joint Exhibit 82 Waterman Bulletin May 4, 1960	Tr. 22	Tr. 22
83	Joint Exhibit 83 Waterman Bulletin June 21, 1960	Tr. 22	Tr. 22
84	Joint Exhibit 84 Waterman Bulletin February 20, 1961	Tr. 22	Tr. 22
85	Joint Exhibit 85 Waterman Bulletin April 24, 1961	Tr. 22	Tr. 22

	Exhibit	Identified	Received
86	Joint Exhibit 86 Waterman Bulletin May 5, 1961	Tr. 22	Tr. 22
87	Joint Exhibit 87 Waterman Bulletin May 25, 1961	Tr. 22	Tr. 22
88	Joint Exhibit 88 Waterman Bulletin June 14, 1961	Tr. 22	Tr. 22
89	Joint Exhibit 89 Waterman Bulletin July 6, 1961	Tr. 22	Tr. 22
90	Joint Exhibit 90 Waterman Bulletin July 21, 1961	Tr. 22	Tr. 22
91	Joint Exhibit 91 Waterman Bulletin September 12, 1961	Tr. 22	Tr. 22
92	Joint Exhibit 92 Waterman Bulletin October 7, 1961	Tr. 22	Tr. 22
93	Joint Exhibit 93 Waterman Bulletin October 24, 1961	Tr. 22	Tr. 22
94	Joint Exhibit 94 Waterman Bulletin January 25, 1962	Tr. 22	Tr. 22
95	Joint Exhibit 95 Waterman Bulletin (Radar Course) February 9, 1962	Tr. 22	Tr. 22
96	Joint Exhibit 96 Waterman Bulletin February 9, 1962	Tr. 22	Tr. 22
97	Joint Exhibit 97 Marine Safe Practice Pamphlet—February 1956	Tr. 22	Tr. 22
98	Joint Exhibit 98 Marine Safe Practice Pamphlet—August 1955	Tr. 22	Tr. 22
99	Joint Exhibit 99 Marine Safe Practice Pamphlet—July 1955	Tr. 22	Tr. 22
100	Joint Exhibit 100 Marine Safe Practice Pamphlet—May 1954	Tr. 22	Tr. 22

	Exhibit	Identified	Received
101	Joint Exhibit 101 Letter to All Masters June 2, 1953	Tr. 22	Tr. 22
102	Joint Exhibit 102 Letter to All Masters December 10, 1953	Tr. 22	Tr. 22
103	Joint Exhibit 103 Load Line and Boiler Surveys	Tr. 22	Tr. 22
104	Joint Exhibit 104 Load Line Inspection	Tr. 22	Tr. 22
105	Joint Exhibit 105 Waterman Bulletin May 20, 1960	Tr. 22	Tr. 22
106	Joint Exhibit 106 Form 448—Rev.	Tr. 22	Tr. 22
107	Joint Exhibit 107 Letter to Pearson May 12, 1961	Tr. 22	Tr. 22
108	Joint Exhibit 108 Waterman Telegram to Cargo Interest-February 11, 1962	Tr. 22	Tr. 22
109	Joint Exhibit 109 Prem Telegram to Waterman February 14, 1962	Tr. 22	Tr. 22
110	Joint Exhibit 110 Waterman Bulletin August 30, 1960	Tr. 22	Tr. 22
111	Joint Exhibit 111 Waterman Organizational Manual October 10, 1955	Tr. 22	Tr. 22
112	Petitioner's 112 Chart	Tr. 502	Tr. 624
113	Petitioner's 113 Photo CHICKASAW aground	Tr. 623	Tr. 623
114	Petitioner's 114 Chart	Tr. 622	Tr. 623
115	Petitioner's 115 Anthony deposition	Tr. 1237	Tr. 1237
116	Petitioner's 116 Weekley deposition	Tr. 1272	Tr. 1272
117	Petitioner's 117 McKenzie deposition	Tr. 1280	Tr. 1280
118	Petitioner's 118 McKenzie deposition exhibit	Tr. 1280	Tr. 1280

	Exhibit	Identified	Received
119	Petitioner's 119 Walsh deposition	Tr. 1318	Tr. 1318
120	Petitioner's 120 Murdock deposition	Tr. 1404	Tr. 1404
121	Claimants' A Patronis deposition	Tr. 289	Tr. 289
122	Claimants' B Filippone deposition	Tr. 404	Tr. 404
123	Claimants' C Kyriakos deposition	Tr. 419	Tr. 419
124	Claimants' D Williams deposition	Tr. 429	Tr. 429
125	Claimants' E Henkle deposition	Tr. 434	Tr. 434
126	Claimants' F Miller deposition	Tr. 443	Tr. 443
127	Claimants' G Simms deposition	Tr. 462	Tr. 462
128	Claimants' H Jensen deposition	Tr. 677	Tr. 683
129	Claimants' I Coast Guard transcript	Tr. 678	Tr. 1091
130	Claimants' J Notice of deposition	Tr. 678	
131	Claimants' K Dixon deposition	Tr. 718	Tr. 718
132	Claimants' L English deposition	Tr. 730	Tr. 730
133	Claimants' M Hall deposition	Tr. 935	Tr. 935
134	Claimants' N Kroh deposition	Tr. 973	Tr. 973
135	Claimants' O Solnordal deposition	Tr. 1004	Tr. 1004
136	Claimants' P Vinson deposition	Tr. 1018	Tr. 1018
137	Claimants' Q Pearson deposition	Tr. 1030	Tr. 1030
138	Claimants' R Keith deposition	Tr. 1053	Tr. 1053
139	Claimants' S Suzuki, Iriya & Nelson depos	Tr. 1056	Tr. 1056
140	Claimants' T Letter dated February 13, 1962	Tr. 1097	Tr. 1097

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141	Claimants' U Statement and Report of Haldane	Tr. 1334	Tr. 1346
142	Claimants' V Back weather reports	Tr. 1433	Tr. 1435
143	Claimants' W Aviation forecast	Tr. 1434	Tr. 1435
144	Claimants' X Weather Department code	Tr. 1434	Tr. 1435
145	Claimants' Y Deposition of Samuel Wylie	Tr. 1488	Tr. 1489
146	Claimants' Z Deposition of Ray Carroll	Tr. 1488	Tr. 1489
147	Claimants' AA Deposition of Lawrence Foley	Tr. 1488	Tr. 1489
148	Claimants' BB Deposition of Curtis Hatchell, Jr.	Tr. 1488	Tr. 1489
149	Claimants' CC Deposition of James Koenig	Tr. 1488	Tr. 1489
150	Claimants' DD Deposition of Frank Kustura	Tr. 1488	Tr. 1489
151	Claimants' EE Deposition of James Mastin	Tr. 1488	Tr. 1489
152	Claimants' FF Deposition of Henry Peterson	Tr. 1488	Tr. 1489
153	Claimants' GG Deposition of Francisco Oliva	Tr. 1488	Tr. 1489
154	Claimants' HH Deposition of Jose Alonzo, Jr.	Tr. 1488	Tr. 1489
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159	Claimants' MM Deposition of Edward Brevier	Tr. 1488	Tr. 1489
160	Claimants' NN Deposition of Malcolm Cieutat	Tr. 1488	Tr. 1489
161	Claimants' OO Deposition of William Jones	Tr. 1488	Tr. 1489
162	Claimants' PP Deposition of Howard F. Menz	Tr. 1488	Tr. 1489

	Exhibit	Identified	Received
163	Claimants' QQ Deposition of Demetrios Miofax	Tr. 1488	Tr. 1489
164	Claimants' RR Deposition of Francis Peredine	Tr. 1488	Tr. 1489
165	Claimants' SS Deposition of Joseph A. Robertson	Tr. 1488	Tr. 1489
166	Claimants' TT Deposition of James Slay	Tr. 1488	Tr. 1489
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173	Claimants' AAA Deposition of James Cantrill	Tr. 1488	Tr. 1489
174	Claimants' BBB Deposition of William F. Cogwell	Tr. 1488	Tr. 1489
175	Claimants' CCC Deposition of Albert Hammac	Tr. 1488	Tr. 1489
176	Claimants' DDD Deposition of David Horton, Jr.	Tr. 1488	Tr. 1489

NOTE: By stipulation of the parties dated April 18, 1967, and Order signed by the Honorable Richard W. Chambers on April 26, 1967, both of which were filed May 1, 1967, it was agreed that the parties to this appeal would not designate those exhibits to be included in the record on appeal until ten days after the filing of Appellant's reply brief, in order to avoid the designation and transmittal of all of the many exhibits when it may develop, after the briefs have been submitted, that only a few are relevant to the appeal. Appellant therefore in this Appendix, in order to comply with Rule 18(2)(f), has included all exhibits identified at trial even though when the designation of exhibits is made pursuant to said stipulation and order, many of the exhibits listed in this Appendix may not become a part of the record on appeal.

No. 21767

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Cargo Claimants,

SHALOM BABY WEAR,

Cargo Claimant,

UNITED STATES OF AMERICA,

Cargo Claimant.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

APPELLEE'S BRIEF.

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JAN 26 1968

WM. B. LUCK, CLERK

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APPELLEE'S BRIEF.

Preliminary.

In limitation of liability, the issue is "privity and knowledge," and "privity like knowledge turns on the facts of particular cases." *Coryell v. Phipps*, 63 S. Ct. 291, 294; 317 U.S. 406, 411 (1943).

In this case we take the facts from the findings. Appellant (Waterman) has not urged that the findings are erroneous: rather they urge that under the findings they should prevail.

The findings are that the ship was unseaworthy because, “. . . the fathometer was not in a reliable working condition” [Find. 4, Clk. Tr. p. 846]; that, “Due diligence was not exercised to make the SS CHICKASAW seaworthy and . . . the unseaworthiness of the fathometer occurred with the privy, fault and knowledge of the Waterman Steamship Corporation” [Find. 6, Clk. Tr. p. 848]. These findings seem conclusive: there is no claim that they are erroneous. Nonetheless, the points argued will be considered in detail under “Argument” below.

Despite the limited scope of this appeal, appellants start with facts taken, not from the findings, but the evidence. They describe, in some detail the various “surveys” and “inspections” to which the CHICKASAW was subjected (App. Op. Br. pp. 2 and 3). That description is incomplete and misleading. An erroneous understanding of the evidence can lead to error in interpreting the findings. We also start, therefore, with a full statement of the case as disclosed by the evidence. We will then pass to the errors asserted.

I.

Appellee's Statement of the Case.

This case involves the stranding of a freighter which was being operated as a common carrier between the United States and various ports in the Far East. On February 7, 1962, the CHICKASAW, returning from Japan, carrying some two million dollars of cargo,* ran into the center of an island some forty miles in length, and four hundred feet high. The hour was approximately 7 p.m. The evening was dark and rainy. For two days, the ship had been unable to obtain a celestial ob-

*Figures are from claims: damages have not yet been tried.

servation [Rep. Tr. p. 299]. Visibility was poor and the island was struck before it was seen [Rep. Tr. p. 443]. Like countless mariners and countless ships, the CHICKASAW was making a landfall under conditions of restricted visibility and poor weather.

A modern vessel like the CHICKASAW ordinarily has at least four devices which would have enabled her to locate her position accurately under these conditions. There is the radar, the fathometer, the deep sea sounding machine, and radio direction finder. On February 7, as the court found, and the evidence established, all these devices were unavailable. Here is the detail:

First: The fathometer was inoperative. The fathometer is a device which sends a sound signal out through the water by means of a diaphragm mounted on the bottom of the ship. The echo of that sound signal from the bottom is received by a device also fitted on the bottom, and the lapse of time is measured electronically. The information thus obtained is displayed on a dial on the bridge which continuously and precisely shows the depth of the water either in feet or in fathoms. The dial shows a red light at zero and another light at the particular depth beneath the ship. The trouble with this fathometer was that it showed red lights all over the dial [Rep. Tr. pp. 665, 1410]: thus there was no way to tell what depth was right [Rep. Tr. p. 690]. Before the ship left Japan, Jensen, the mate, noted this condition, reported it to the master, and it was entered in the log [Rep. Tr. pp. 666-667].

Why was it that the fathometer did not work? Here are the facts:

Following the stranding, the CHICKASAW was examined by experts both for Waterman and the claim-

ants. Appellant's own expert made the following report:

"There is no way of determining whether or not this equipment would have worked correctly at any particular time in the past. There was ample evidence that its operation could be highly erratic and unstable for both mechanical and electronic reasons. There was also ample evidence to lead one to conclude that it had not been serviced for a long time. It was definitely in need of service at the time of this inspection for both mechanical and electronic reasons." [Rep. Tr. p. 1345].

Because it deteriorates with time, a fathometer needs preventative maintenance and should be inspected annually [Rep. Tr. p. 693]. Such an inspection would have revealed the defects which caused the malfunction of the CHICKASAW's fathometer [Rep. Tr. p. 693], a malfunction due to deterioration over a period of years [Rep. Tr. p. 705]. The last record of any work on the CHICKASAW's fathometer was *five years* before the stranding [Pet. Ex. 120, p. 35]. This was corroborated by the second mate who had served on board for five years and who testified that nothing had ever been done to it for five years [Rep. Tr. p. 390]. It had been so long since anyone had looked at the receiver amplifier (the electronic essential part of it) that the housing cover had to be pried off before it could be inspected by appellee's expert—it had been painted over with three separate coats of paint [Rep. Tr. p. 686].

How did this state of decay come to exist? What of these "inspections", "surveys", and "examinations",

which Waterman describes in their statement of the case. The short answer is that none of these “inspections”, “surveys”, and “examinations” concerned the fathometer. Neither the Coast Guard [Rep. Tr. pp. 1315-1316] nor the Federal Communications Commission nor the American Bureau of Ships looked at it. That is not to criticize these agencies: such inspections are not their responsibility. But, as we will see below, such inspections *are* the owner’s responsibility. And the owners made no inspections.

Murdock. Waterman’s Port Captain for Mobile, testified:

“Q. Does the company have again any regular program for causing the fathometer to be opened and inspected, checked, have anything done to it?

A. We do not have a regular program of that type.” [Pet. Ex. 120, pp. 35-36].

On the basis of this evidence, the court found that:

“The S.S. CHICKASAW was unseaworthy at the commencement of the voyage from each port in the Far East to the United States in that the fathometer was not in a reliable working condition.” [Clk. Tr. p. 846].

It further found that:

“Although there was some showing that the fathometer was operating properly immediately after the stranding, the mechanical and electronic condition of the fathometer was such that it could not be expected to operate consistently; that it was corroded, its electrical connections loosened and that it was generally in bad repair.” [Clk. Tr. p. 847].

And the court found that:

“Due diligence was not exercised to make the S.S. CHICKASAW seaworthy and that the loss of the vessel, the absence of due diligence, the unseaworthiness of the fathometer occurred with the privity, fault and knowledge of the Waterman Steamship Corporation.” [Clk. Tr. p. 848].

The trial court found that the inoperative fathometer was the cause of the stranding. Jensen, the third mate on watch prior to the stranding, had noted, before this voyage commenced, that the fathometer was not operating and an entry to that effect was made in the log [Rep. Tr. pp. 666-667]. Jensen was on watch just prior to the stranding, looking anxiously through the night for breakers [Rep. Tr. p. 1407]. He testified that he did not use the fathometer, because he knew it did not work [Rep. Tr. p. 665]. All of the experts agreed that its use would have averted the stranding [Rep. Tr. pp. 528-529, 802].

Second: The useless R.D.F. The second major navigational aid which was unavailable was the radio direction finder. A radio direction finder is a special type of radio with a directional antenna. The antenna can be rotated toward a signal. The navigator listens to the signal in headphones. When the antenna is positioned perpendicular to the direction of the signal, there is a “null”, or silent spot in the center. He can then read the bearing of the signal, in degrees, on the instrument.

As a ship approaches a coast, with the aid of this device, she can obtain the bearing of signals from radio beacons along the shore. The locations of those bea-

cons are printed on the ship's charts. If the ship has bearing from two of those stations, at different angles, those angles intersect on the chart, and the ship has a position.

The dial of such instrument does not read correctly at all angles: each bearing has what is called an "error". Use of such a device requires knowledge of the error of the particular instrument on the particular ship, at each bearing [Rep. Tr. p. 793]. The error varies with the ships heading and changes from time to time [Rep. Tr. p. 794]. Therefore, under regulations in effect in 1965 that the calibration particulars for the radio direction finder had to be checked *annually*, and that a record be kept on board of its error [47 C.F.R. § 8.517]. This is accomplished by swinging the ship in a circle, in sight of a radio direction finder beacon which corresponds with a visual beacon [Rep. Tr. p. 795]. The actual bearings, visually determined, are compared with the bearings obtained by the RDF, and a table of corrections is thus established.

This stranding took place in February of 1962. There was a chart of errors posted. The chart was *five years old* [Rep. Tr. pp. 346-347]. No one on board the ship, neither the master, nor any of the mates, knew whether the chart was usable: whether it represented errors which still existed, or errors which had been corrected by modification of the machine [Rep. Tr. pp. 242, 348]. Indeed, no one knew what if any correction to use in taking readings from the RDF [Rep. Tr. p. 243].

Readings actually obtained, as the vessel approached the shore, were wildly erratic: so wildly erratic that the master did not rely on them [Rep. Tr. p. 100]. The

court found that the pattern of variation was greater than could be accounted for by radio direction finder error, and must have resulted from negligence in taking the bearings [Clk. Tr. p. 849].

Our expert [Rep. Tr. p. 793] and Waterman's [Rep. Tr. p. 539] agree that in view of the fact that the error of the RDF was unknown, the RDF *could not be used for accurate navigation*. The CHICKASAW was effectively without a radio direction finder. It is not surprising that the crew was careless in the use of a useless instrument.

Third: The absent sounding machine. The third aid to navigation was a deep sea sounding machine. The deep sea sounding machine consists of a winch located on the forward part of the vessel, equipped with a very long and very fine steel wire. It is used to drop a supply of special bottles. The bottles contain material which changes color as the depth increases. After the bottle is retrieved it is compared with a chart which gives the depth for the color shown [Rep. Tr. p. 803].

This, like the fathometer, is a device for determining how much water there is beneath the ship, surely a useful machine to avoid stranding. Coast Guard regulations require that vessels be equipped with either a fathometer or a deep sea sounding machine [46 C.F.R. § 96.27-1]. Needless to say, an inoperative machine does not comply with the regulations.

The deep sea sounding machine is not frequently used on ships today because its use requires the ship to slow down [Cl. Ex. A, p. 210]; it is less convenient than the fathometer. Thus, it was not practical to use it at the ship's 16.5 knot speed.

“[T]he sounding machine, even had it been attached and in good working order, was not the type of device ordinarily used, nor was it practical to use it under the conditions existing immediately prior to the grounding.” [Clk. Tr. p. 850].

But, with the fathometer gone, had the sounding machine been available, its value should have been great, for surely the ship could have slowed down.

The deep sea sounding machine was lost in the following way: the mate told the Bos’n to sell it for scrap when the vessel was in Japan, before the start of this voyage [Rep. Tr. p. 748]. The reasons given for selling it are (1) it required “a lot of extra upkeep” [Rep. Tr. p. 744], and (2) that it was “rusty and no good” [Rep. Tr. p. 723].

Fourth: The disabled radar. The radar broke down on the outbound voyage between San Francisco and Japan [Rep. Tr. p. 216]. The trouble was that a number of teeth had broken off the pinion gear which rotated the antenna [Rep. Tr. p. 694].

The master of the CHICKASAW, Captain Patronas, did not have a radar endorsement on his license and knew nothing whatsoever about radar [Rep. Tr. pp. 197-198]. He made an attempt to get it repaired in Japan [Rep. Tr. p. 219], and was advised in Tokyo that no gear was available [Rep. Tr. p. 220]. He did not attempt to get a comparable gear in subsequent ports [Rep. Tr. p. 222], although one could have been machined during the thirty-five days the ship was in the Far East [Rep. Tr. p. 1060]: nor was any attempt made to have one flown out from the United States [Rep. Tr. p. 223], although this could have been done [Rep.

Tr. p. 1063]. His view was that since radar is not required by the regulations, the repair was unnecessary [Rep. Tr. p. 222]. The court found that this was not an unreasonable decision [Clk. Tr. p. 849].

Fifth: The compass and the course recorder. Neither the compass nor the course recorder is likely to have directly caused the stranding. But their condition, again, is a relevant background fact, which the trial court was entitled to consider in reaching the conclusion that unseaworthiness existed with the privity of the owners.

The ship was equipped with both magnetic and gyro compasses. Compasses require periodic correction. There was no correction card on board for one of the magnetic compasses [Rep. Tr. p. 374] and the correction card for the remaining compass was something over ten years old [Rep. Tr. p. 372]. The ship was equipped with a course recorder: a device which is useful in determining whether the vessel is making the course which her navigators intend. The course recorder did not work because the right paper rolls had never been supplied [Rep. Tr. pp. 366-367]. The record shows everywhere a total absence of any but the bare maintenance actually compelled by the Coast Guard.

Sixth: The facts as regards delegation of authority to the master. We have already seen that the court found that the fathometer was unfit—corroded, with loose connections—all with Waterman's privity. In addition, as an alternative, the court found that, after Jensen, the mate, discovered the deficiency "*Even if . . .*" the fathometer was sound, the ship was unseaworthy, because it departed from port without finding out whether the fathometer would work [Clk. Tr. p. 847]. This is unseaworthiness for the practical reason

that a crew cannot rely on a device which they reasonably believe to be unsound. The court found (the detail will be set forth below in section IV) that Captain Patronas, the master, failed to exercise due diligence in leaving port without resolving this uncertainty [Clk. Tr. p. 847]. And in the first paragraph of Finding 6, the court found that all authority with respect to repairs was delegated to the master; hence that Waterman is charged with his specific knowledge of the fathometer's condition.

In argument to this finding, Waterman proceeds as if Patronas was an ordinary master, exercising ordinary authority, under ordinary supervision. Again, that is not so. The background of evidence against which this finding was made is as follows:

Appellant's general agent for the Orient was Everett Steamship Company [Rep. Tr. p. 1170]. Everett is itself a ship operator. Everett had authority to fix the schedules for appellant's vessels [Rep. Tr. p. 1111]: to tell them where to go and when to go, where to stop, what cargo to pick up [Rep. Tr. p. 1110]—to direct their every movement. Everett had offices in all of the Far East ports where appellant stopped. In Tokyo, Max Nelson, Everett's operations manager, had responsibility for appellant that ". . . pretty well covers the whole gamut of ship operations." [Rep. Tr. p. 1109].

But in the field of repairs, "they . . . [did] not have any authority to initiate any repairs." [Rep. Tr. p. 1171]. There was no program of checks by any supervisory personnel to verify seaworthiness at any foreign port [Rep. Tr. pp. 1173-1174]. The master was the only person with authority to initiate repairs [Rep. Tr. p. 1177].

This is in fact the same rule as that applied when the ship was in U.S. ports. At no point, anywhere in the world, did appellant have any program for determining whether their ships were seaworthy as respects navigational instruments. At all times and places, the policy was the same. The matter was left entirely in the hands of the master. There was no practice of preventive maintenance: no practice of inspection: no reports were required of the master and no questions asked. This contrasts radically with the engineering department, which required detailed reports about everything [Rep. Tr. p. 1383].

The chief witness on this subject was Captain Murdock, appellant's Mobile Port Captain. Murdock had described inspection trips in which he checked "the paint condition . . .", "whether it is kept clean," "whether it is good housekeeping" [Rep. Tr. p. 1360]. But as to the navigational equipment, his testimony was:

"Ordinarily—it is not a routine thing that I check navigational equipment, but I occasionally do check it." [Rep. Tr. p. 1360].

The *only* basis upon which a repair is made to any navigational equipment is "the request of the master, or the recommendation of the Coast Guard, or any of the regulatory bodies." [Rep. Tr. p. 1372]. Apart from carrying out any recommendations the master might make, the company had no program of its own for finding out if any deck equipment needed repairs [Rep. Tr. p. 1372].

Thus, Murdock admittedly had never, prior to the casualty, inquired of the mates concerning the fathometer's operation [Rep. Tr. pp. 1389-1390]. And com-

parably there was no program for seeing that an accurate table of corrections for the RDF was made or of inspection to see if one was on board [Rep. Tr. p. 1378]. And while the deck logs were sent into Mobile, no one read them [Rep. Tr. p. 1383]. And while the mate is required to send in a report to Murdock listing the work he has done during the voyage, no reference is made in these reports to "the operation of the radar or the gyro compass or the fathometer or the radio direction finder." [Rep. Tr. p. 1384].

Since appellant's home office took no responsibility for repairs, and no responsibility for the condition of the navigational equipment of the ship, they had (with one exception, to which we will come) no communications with her officers about this equipment.

Patronas, her master, testified:

"Q. At the time you left the WARRIOR [Patronas' prior ship; he had just joined the CHICKASAW], did the owners request you to give them any kind of a report on the performance or [sic] navigation equipment during the previous voyage? A. No.

Q. Did the owners ever, during your years aboard any Waterman vessel, ask you for any reports at the end of a voyage concerning the performance of her navigation equipment? A. I don't remember.

Q. Have the owners ever asked you before a vessel of which you were master went into annual survey, have they ever asked you for any reports concerning her navigation equipment? A. No, sir." [Rep. Tr. pp. 283-284].

In consequence, the master did not even know what the arrangements were for the repair of the radar. We quote:

“Q. Did they ever tell you what arrangements they had for repair of the radar? A. No.” [Rep. Tr. p. 232].

Now Anthony, operations manager of appellant, claimed that it was a matter of routine to ask the master and mates if the navigation equipment was operating satisfactorily [Rep. Tr. pp. 1155-1156], even though he could not recall ever having such a conversation with Patronas [Rep. Tr. pp. 1207-1208]. So, as to this, the testimony of Filippone is of particular interest. Filippone had served as both chief mate and second mate on the CHICKASAW during his five years on board (the last trip was Patronas’ first). He testified as follows (we set it forth at length because it conveys, more clearly than argument, the total lack of communication between Waterman and its officers):

“Q. Have you ever at any time since you joined the CHICKASAW as a deck officer in any capacity had any discussion with Captain Murdock regarding your duties aboard the CHICKASAW? A. None whatsoever.

Q. Have you ever had any discussion with him about maintenance of the navigation equipment? A. No, sir.

Q. Has he ever given you any instructions or orders regarding the maintenance of the navigation equipment? A. None whatsoever.

Q. Has any other representative of Waterman Steamship Company other than Captain Murdock ever since you have been a deck officer aboard her

had any discussion with you concerning the navigation equipment aboard the CHICKASAW? A. No, sir.

Q. Has any person from Waterman Steamship Company ever since you have been a deck officer on board the CHICKASAW had any discussion with you about the procedure to be followed in maintaining the navigation equipment aboard the CHICKASAW? A. None whatsoever.

Q. Was there any discussion about the procedure to be followed in maintaining any of the equipment aboard the CHICKASAW? A. None.

Q. Was there any discussion about how the equipment aboard the CHICKASAW of any kind had performed during previous voyages? A. No, sir.

Q. There were no discussions in that general area at all? A. Nothing whatsoever.

Q. Since you have been working for Waterman Steamship Company as a deck officer? A. No.

Q. What about working for Waterman Steamship Company as a deck officer on other ships, was there any discussion whatsoever with Waterman representatives at any time regarding your duties? A. Not to the best of my knowledge.

Q. Was there any discussion at any time with regard to the navigation equipment of any of the ships on which you had served? A. None.

Q. What spare parts were aboard the CHICKASAW when she left Mobile? A. I couldn't tell you. I don't know.

Q. What spare parts were aboard for the radio direction finder? A. I couldn't tell you. I don't know.

Q. Were you ever told by anyone what spare parts were aboard for the radar? A. No.

Q. Were you ever told by anyone what spare parts were aboard for the radio direction finder? A. No, sir.

Q. What spare parts were aboard for the fathometer? A. I don't know." [Rep. Tr. pp. 387-389].

This pattern of operation finds its most remarkable exemplification in the sale of the sounding machine. The machine was too much trouble to maintain [Rep. Tr. p. 744] so the mate told the bos'n to take it off and sell it. And to the question whether he needed authority he said:

"Q. Did you discuss it with any representative from Waterman? A. No, sir.

Q. Did you have any orders from Waterman to get rid of it? A. No, sir.

Q. Did you ask their permission whether you could get rid of it or not? A. No, sir.

Q. In the way Waterman operated these ships was it necessary for you to ask their permission? A. No, sir." [Rep. Tr. p. 749].

Anthony (Watersman's vice president in charge of operations) said that the sale was never authorized [Rep. Tr. pp. 1171-1172]. *But neither he nor anyone else denied English's testimony that no authorization was needed.* And English continued to sail for appellant after the CHICKASAW was lost [Rep. Tr. p. 1222]: no one considered the sale of the sounding machine an offense.

Patronas, then, the master, had authority in this area equal to any Vice President. Uninstructed, unadvised, and undirected, it was up to him to decide whether or not the CHICKASAW would be seaworthy. He could even sell the very equipment of the ship off the deck. And the consequence was that the fathometer did *not* get annual inspections—or any inspection at all—instead it got three coats of paint.

But we have exaggerated. It is not quite true that Patronas had *no* instructions. Appellant did have a book of instructions to masters [Jt. Ex. 51]. The text, however, antedated the fathometer, radar, the RDF, the sounding machine and the gyro compass, and said nothing about them. The only current instructions were the following:

“SUBSIDY—NO FOREIGN REPAIRS

“Effective upon receipt of this letter you will no longer use foreign labor for maintenance and repair work on our vessels, except in those cases where the repairs are necessary for the vessel to (1) proceed on her voyage with safety (2) continue to work cargo with customary efficiency.

“To further analyze this—repairs to radar, radio, gyro compass, the cleaning of cargo holds, removal of grain fittings and emergency (and necessary) repairs to machinery are acceptable.

“It is prohibited to use foreign labor for scaling, painting or any other work except in emergency as listed above.

“Lest there be a misunderstanding on anyone’s part, *this is a law under subsidy, and a direct or-*

der from this Company and it must be obeyed to the letter. NO REPAIRS EXCEPT REAL EMERGENCY.

* * *

“WATERMAN STEAMSHIP
CORPORATION

/s/ F. L. Murdock

F. L. Murdock,

Port Captain” [Jt. Ex. 92].

It is worth noting that while those instructions *permit* (but do not require) repair of radio, radar and gyro compass, they do not even *permit* repair of the fathometer except for “Real Emergency.”

Let us correct our statement then: Uninstructed, inadvised and indirected—*except that there were to be no repairs in foreign ports*—it was up to Patronas to decide whether or not the CHICKASAW was to be seaworthy. Is it the law that by washing its hands and doing nothing a shipowner gets immunity? That is appellant’s argument. We pass to that argument.

ARGUMENT.

I.

The Deposition of John E. Jensen Was Properly Received in Evidence.

Appellant's first argument is that the court erred in admitting the deposition of Third Mate, John E. Jensen. Jensen was the mate who testified that he did not use the fathometer on the fatal night because it was not working.

The argument is that since death cut off the opportunity to cross-examine, the testimony taken should not be received. But appellant cannot urge receipt of this evidence as error. Appellant's principal witness was an expert, Captain Slack. Slack expressed the opinion that the cause of the stranding was negligence, not unseaworthiness. Slack's testimony was admittedly based in part on abstracts of depositions, *including Jensen's deposition*, furnished by counsel [Rep. Tr. p. 526].

Having placed in evidence testimony based on an abstract of Jensen's deposition, appellant cannot object to receipt of the deposition itself.

"It is a well established law that where one party opens a field of inquiry that is not competent or relevant to the issues in the case, he will not be heard to complain that his adversary was allowed to avail himself of this opening and introduce additional evidence pertinent to that field of inquiry even though under other circumstances the testimony would be inadmissible." [*United States v. Regents of New Mexico School of Mines*, 185 F. 2d 389, 391 (10 Cir. 1950)].

"As here the accused by his voluntary act, placed in evidence the testimony [depositions] disclosed

by the record in question, and thereby sought to obtain an advantage from it, he has waived his right of confrontation as to that testimony, and cannot complain of its consideration.” [*Dias v. United States*, 223 U.S. 442, 32 S. Ct. 250, 253 (1912)]. Wigmore on Evidence (2nd Ed. 1940) § 15, pp. 304-309.

Beyond this, there was no error, even had there been no consent.

Jensen's deposition was taken for less than one day when he complained of feeling ill. By mutual consent of the parties, completion of the deposition was continued until Jensen's condition improved [Rep. Tr. p. 673]. Very shortly thereafter, it was ascertained that Jensen had suffered a heart attack [Rep. Tr. p. 674]. Later, when appellees sought to resume his deposition, it was learned that Jensen had died [Rep. Tr. p. 674]. The cases consistently uphold the admission of depositions on these facts.

As good a case as any is that cited by appellant: *Inland Bonding Co. v. Mainland National Bank of Pleasantville*, 3 F.R.D. 438 (D.C.N.J. 1944). In that case, the court held that where the deponent had died before cross-examination, and lack of opportunity to cross-examine was the fault of neither party, the partial deposition *could* be received into evidence. Exactly the same conclusion has been reached by every Federal court that has had occasion to consider this problem.¹

¹Although not necessarily apposite, every case cited by appellant except *Rutherford v. Geddes*, 4 Wall. 220, 18 L. Ed. 343 (1867) admitted the deposition testimony sought to be suppressed. In the *Rutherford* case, defendants' motion to suppress was granted because the deposition was taken without notice, in another action to which defendants were not parties, and because no showing was made that the witness could not personally appear.

The law was established by Mr. Justice Story in the case of *Gass v. Stinson*, 10 F. Cas. 72 (CC Mass. 1837). In that case, the plaintiff had a commissioner take the answers of a witness to written interrogatories. Before the filing of any cross-examination, the witness died. In upholding the admission of the dead witness's direct testimony, Justice Story stated:

"In *Arundel v. Arundel*, 1 Ch.R. 90, the very case occurred. A witness was examined for the plaintiff and was to be cross-examined for the defendant; but before he could be cross-examined he died. Yet the court ordered his deposition to stand." [10 F. Cas. at 75].

Some forty years later, the court in *In Re Cary*, 9 Fed. 754, 756 (S.D.N.Y. 1881) said:

"[T]he loss of opportunity to cross-examine the witness, by his death or other inevitable accident is not sufficient to exclude the deposition and it may be received for what it is worth."

Then followed the decision in *Inland Bonding Co.*, *supra*, and *Inland Bonding* was followed by *Rosenthal v. People's Cab Co.*, 26 F.R.D. 116 (W.D. Pa. 1960), and *Derewecki v. Penn RR*, 353 F. 2d 436 (3rd Cir. 1965). To the same effect are Wigmore, *Evidence*, § 1390, at 110-111; McCormick, *Hornbrook on Evidence*, § 19, at 41-42; 3 Jones, *Evidence*, 717, at 1347.

Appellant relies on § 19 of McCormick's *Hornbrook on Evidence* (App. Op. Br. pp. 13-14). But Section 19 says:

"In the case of death there seems no adequate reason for excluding the direct testimony. It has been suggested that exclusion of the direct should

be discretionary but no matter how valuable cross-examination may be, common sense tells us that the half-loaf of direct testimony is better than no bread at all. This was the accepted practice in equity. It is submitted that the judge should let the direct testimony stand but should be required on request to instruct the jury in weighing its value to consider the lack of opportunity to cross-examine.” [§ 19 at 41-42].

[To the same effect, McCormick’s article, *The Scope and Art of Cross-Examination*, 47 Northwestern L. Rev. 177, 197 (1952)].

There remains a further difficulty with appellant’s argument. Appellant can show no prejudice. On the critical question of why the fathometer was not used prior to the grounding, Jensen’s Coast Guard testimony, which was admitted without objection [Rep. Tr. pp. 680-681], and his deposition testimony are identical: The pertinent portion of his deposition is as follows:

“Q. You did not use it [the fathometer] at any time, I gather, because based on what you saw, it was out of order and useless? A. Yes. I didn’t use it personally after that.” [Cl. Ex. H, p. 43].

Jensen’s Coast Guard testimony is:

“Q. What was the main reason for not using the fathometer? A. *Well, it was out of order, in my opinion.*

Q. *It was out of order, in your opinion?* A. *Yes, sir.*” [Cl. Ex. I, p. 251]. (Emphasis added).

To say that “the unmistakable conclusion from the complete Coast Guard transcript is that Mr. Jensen was

far too busy on the wing of the bridge looking for ‘dis-colored water’ ” to use the fathometer (App. Op. Br. p. 17) ignores the witness’s testimony and is patent nonsense. What rational man, at 7 p.m. in February, would peer through the rainy night, trying to guess the depth of the water from the color (!!), if he had a workable machine that would give him an accurate reading in a warm cabin, with no more effort than looking at one’s watch?

Finally, it should be noted in passing that this cause was tried to the court. It must be presumed that in making its finding that the court had fully in mind the difference in weight between the Coast Guard testimony, as to which there was cross-examination, and the deposition, where there was not.

MacDonnell v. Capital Co., 130 F. 2d 311, 318
(9th Cir. 1942), cert. denied 317 U.S. 692,
63 S. Ct. 324 (1942).

II.

Appellant Was Properly Denied Exoneration for Cargo Damage to Cargo Loaded Prior to and After December 25, 1961 Because of the Unsea- worthiness of the Fathometer.

Appellant’s second argument is that there is no liability for any damage to cargo loaded prior to December 25, 1961. That argument is vital because its premise underlies appellant’s whole claim that there should be limitation of liability. The argument is that:

“ . . . It is clear, however, from the court’s remaining findings, and in particular, Finding Four

[R. 846], Finding Five [R. 847], and Finding Eleven [R. 850], that but for Captain Patronas' negligence in failing to repair or check the fathometer after notification of uncertainty as to its condition on December 25, 1961 (after departure from Kobe, Japan), exoneration would have been granted under the provisions of 46 U.S.C. § 1340-(2) relating to negligent navigation." (App. Op. Br. p. 20).

The same argument is made at page 46 of appellant's brief, where, in summarizing the argument that limitation should be allowed, appellant says:

"In all of the lower court's Findings of Fact and Conclusions of Law in this action, only one negligent act is found. That act was the failure of Captain Patronas to exercise due diligence to make the fathometer seaworthy when, with knowledge of uncertainty with respect to its condition, he took no steps to repair or check it [Finding of Fact (5) R. 847]. Thus, limitation of liability could properly be denied only if Captain Patronas' negligence under the law is imputed to Appellant." (App. Op. Br. p. 46).

But none of this is so: *Captain Patronas' negligence is not the only fault found*. The court found in the first sentence of Finding 3 that:

"The S.S. CHICKASAW was unseaworthy at the commencement of the voyage from each port in the Far East to the United States in that the fathometer was not in a reliable working condition. The fathometer is an electronic device which measures and reports the depth of water beneath the vessel." [Clk. Tr. p. 4] (Emphasis added).

The reason why the fathometer was in an unreliable condition was found as follows:

“Although there was some showing that the fathometer was operating properly immediately after the stranding, *the mechanical and electronic condition of the fathometer was such that it could not be expected to operate consistently; that it was corroded, its electrical connections loosened and that it was generally in bad repair.*” [Find. Four, Clk. Tr. p. 846] (Emphasis added).

We have already detailed the evidence supporting that finding. It is not and cannot be challenged—indeed it is the testimony of appellant’s own expert.

This is the unseaworthiness of the fathometer. And the court found in express and comprehensive terms in the second paragraph of Finding 6 that:

“Due diligence was not exercised to make the S.S. CHICKASAW seaworthy and that the loss of the vessel, the absence of due diligence, *the unseaworthiness of the fathometer occurred with the privity, fault and knowledge of the Waterman Steamship Corporation.*” [Clk. Tr. p. 848] (Emphasis added).

Note again the words: “*the unseaworthiness of the fathometer . . .*” occurred with Waterman’s privity. The “unseaworthiness of the fathometer” is the rusty, corroded, loosened condition of the machine.

To repeat briefly the evidence, a fathometer, should be inspected annually [Rep. Tr. p. 693]. But nobody touched the CHICKASAW’s fathometer during the five years before the stranding except to give it three coats of paint [Rep. Tr. p. 686]. How can it be con-

tended, then, that either this condition, or the lack of due diligence, dated from December 25, 1961? And how can it be contended that this is a fault ascribable solely to Captain Patronas? For it represents at least five years of neglect and Patronas joined the ship on November 3, 1961 [Rep. Tr. p. 55], a bare three months before she was lost.

Now the court *also* found that:

“Even if the deficiency of the fathometer had been temporary only and even if the fathometer would have worked if it had been used, to leave port without checking it or repairing it was to leave port with the vessel in an unseaworthy condition for the reason that Jensen in his then state of knowledge as respects the fathometer, could not have been expected to use or rely upon it.” [Clk. Tr. p. 847] (Emphasis added).

But when the court said “even if . . .”, it did not cancel its express finding that the fathometer was *not* seaworthy. Rather, as we will see, it stated an alternative ground for decision: equally compelling.

We will see below that, with respect to the “Even if” finding, the court found that Patronas failed to exercise due diligence in that he took no step to remove this “uncertainty” [Clk. Tr. p. 847]. And similarly the court found (as we will later see in detail) that Waterman had delegated managerial authority to Patronas, so that this want of due diligence was Waterman’s. All this will be discussed below, in part IV of this brief. But we take up first the effect of the findings that the fathometer *was* unseaworthy.

What is the effect of the unseaworthiness of the fathometer? Above all else, this record makes one thing abundantly clear—appellant did not have any system of inspection of the fathometer (or anything else). This fact is confirmed both by the ship's personnel and appellant's shoreside employees, and is alone sufficient to sustain the court's finding of lack of due diligence.

Ionion Steamship Co. of Athens v. United Distillers, 236 F. 2d 78 (5th Cir. 1956);

Ore Steamship Corporation v. D/SA/S HASSEL, 137 F. 2d 326 (2nd Cir. 1943);

Standard Oil Company v. Anglo-Mexican Petroleum Corporation, 112 F. Supp. 630, 637 (S.D.N.Y. 1953).

In the *Ionion* case, the court correlated due diligence and the duty to inspect as follows:

“[W]here the standard of due diligence is applicable, it comprehends inspection and investigation, where prudent, to determine the existence of deficiencies *before they become critical*, and the failure to discover defects which examination would necessarily have disclosed is the very absence of due diligence.” [236 F. 2d at 84] (Emphasis added).

How can a duty to inspect and discover defects “before they become critical” be reconciled with appellant's theory that responsibility arises from the moment of total failure only?

The condition of the fathometer: this total want of inspection, attention, or anything else, precludes exoneration. There is no “due diligence” shown on this record. What of limitation of liability?

III.

**Failure to Take Steps to Provide Seaworthy
Equipment Precludes Limitation.**

We have in this case, on the facts, a total failure on the part of the owner to do *anything* to make the ship safe. The condition of the fathometer is traceable to a total lack of inspection and maintenance for at least five years. Analogously, the correction table for the radio direction finder was five years old and worthless. So casual was supervision that although the mate sold the very equipment off the deck of this ship, before this voyage started, without express authorization from his superiors, he continued to sail without criticism, comment or complaint as chief mate for appellant. His testimony—that he needed no authorization—appears to state the situation accurately. The rolls were wrong for the course recorder—the fathometer corroded—the compass uncorrected—the whole situation smells of indifference.

Now as we understand appellant's argument, it believes that these facts require limitation as a matter of law. Because the president, vice president, directors and port captains were careful to have nothing to do with the maintenance of this equipment, they are relieved of liability—everything was left to the skipper and they are not liable for what the skipper does. This is the theory. It is hard to imagine an approach which would place a higher premium on managerial indifference. Is this all there is to the law? Not by quite a bit.

The shipowner's obligation is to exercise "control"—to provide a sound ship. Absent effective control, a shipowner will be denied limitation. This is contrasted

to “instantaneous negligence” of the crew, for which the owner is not responsible. This fundamental difference has been clearly spelled out by this court.

In the second rehearing of the *Pennsylvania (States Steamship Company) v. The United States*, 259 F. 2d 458, 474 (9th Cir. 1958), cert. denied 358 U.S. 933, 79 S. Ct. 316 (1959), rehearing denied 359 U.S. 921, 79 S. Ct. 579 (1959), the court there set forth, quoting Gilmore and Black, *The Law of Admiralty*, 2d Ed. 1957, that:

“The principle of the Limitation Act is the same as that found in the Harter Act and the Carriage of Goods by Sea Act: because of the extraordinary hazards of seaborne commerce and because the owner can exercise only a nominal control over his “servants” once the ship has broken ground for the voyage, the owner should be entitled to exoneration from liability, or at least to a limitation of liability, for whatever happens after the ship has passed beyond his effective control. *Contrariwise, he should be held to liability for all loss resulting from his failure to exercise effective control when he had the chance.*”⁶ Although the Limitation Act uses a vocabulary different from that of Harter and Cogsca, the concept of liability is the same: the shipowner is not chargeable with “privity or knowledge” or with “design or neglect” when he has used “due diligence” to furnish a seaworthy ship; he is so chargeable when he has failed in his duty of “due diligence” and has sent out a ship unseaworthy in some respect that proximately contributes to the loss.””

And in Note 6, the court quoted *The Cleveco*, 154 F. 2d 605, 613 (6th Cir. 1946):

“(‘* * * knowledge means not only personal cognizance but also the means of knowledge—or which the owner or his superintendent is bound to avail himself—of contemplated loss or condition likely to produce or contribute to loss, unless appropriate means are adopted to prevent it.’), and in *Great Atlantic & Pacific Tea Co. v. Brasilerio*, 2 Cir., 159 F.2d 661, 665 (‘*The measure in such cases is not what the owner knows, but what he is charged with finding out.*’)” (Emphasis added).

There is an infinity of authority to the same effect.

Thus, appellant had no system for inspecting the CHICKASAW’s navigational equipment. But a vessel owner is required to conduct proper inspections and limitation will be denied if he does not.

Austenberry v. United States, 169 F. 2d 583 (6th Cir. 1948);

Calvert, 51 F. 2d 494 (4th Cir. 1931);

In Re P. Sanford Ross, 204 Fed. 248 (2nd Cir. 1913);

In Re Petition of Henry DuBois’ Sons Co., 189 F. Supp. 400 (S.D.N.Y. 1960).

He is chargeable with knowledge of all that the proper inspection would have revealed.

Dexter-Carpenter Coal Co. v. New York, O. & W. Ry. Co., 50 F. 2d 270, 271 (S.D.N.Y. 1931).

“[T]he owner’s lack of knowledge can only mean that the owner did not inspect the vessel or provide a regular system of inspection . . . its unfitness

would have been visible to anyone on a careful inspection. Under such circumstance, proof by the owner that a carpenter in its employ went over the boats and did minor jobs on them, does not suffice to bring the case within the limitations act."

Accord:

Argent, 1940 A.M.C. 508 (S.D.N.Y. 1915).

That appellant purported to delegate the duty to inspect does not change the result.

The Miami, 43 F. 2d 562 (S.D.N.Y. 1930).

There, limitation was denied where the corporate shipowner left the matter of inspection to the captain. The court held:

"There is no proof that there was any serious system of inspection or reliance upon any really competent reason for that purpose.

"Under such circumstances not only has there been a failure of proof on the part of the petitioner, but the facts all indicate a situation that may well raise a presumption that the corporation must be presumed to have had knowledge of her condition. See *P. Sanford Ross, Inc.*, 204 Fed. 248 (2 CCA)." (43 F. 2d at 564).

Again, if responsibility is delegated, the cases establish that a shipowner must give appropriate instructions to the ship's personnel to whom the management of the vessel is entrusted.

Coleman v. Jahncke Service, Inc., 341 F. 2d 956 (5th Cir. 1965), cert. denied 382 U.S. 974, 86 S. Ct. 538 (1966);

Kulack v. The Pearl Jack, 79 F. Supp. 802 (W.D. Mich. 1948), aff'd 178 F. 2d 154 (6th Cir. 1948).

Shipowners must take an active role in the management of their vessels and avail themselves of every means of knowledge concerning conditions likely to contribute to a casualty unless appropriate action is taken.

Continental Ins. Co. v. Sabine Towing Co., 117 F. 2d 64 (5th Cir. 1941), certiorari denied, 61 S. Ct. 1111, 313 U.S. 588, 85 L. Ed. 1543;

The Cleveco, 154 F. 2d 605 (6th Cir. 1946);

Great Atlantic & Pacific Tea Co. v. Brasileiro, 159 F. 2d 661 (2nd Cir. 1947), cert. denied, 331 U.S. 836, 67 S. Ct. 1519 (1947);

Pennsylvania (States Steamship Co.) v. United States, 259 F. 2d 458 (9th Cir. 1957); rehearing 259 F. 2d 470 (9th Cir. 1958), cert. den. 358 U.S. 933, 79 S. Ct. 316 (1959);

In Re Petition of Henry Du Bois' Sons Co., 189 F. Supp. 400 (S.D.N.Y. 1960);

Petition of Sause Bros. Ocean Towing Co., 193 F. Supp. 14 (D. Oregon 1960);

Tug Carrie Mack-Barge 204, 194 F. Supp. 383, (S.D. Ala. 1961);

Ruth Conway Tug Hustler, 75 F. Supp. 574 (D. My. 1947).

One of the classic reasons for denying limitation is the failure of the vessel owner to suitably equip his vessel. This is best illustrated by Judge Learned Hand's opinion in

The T. J. Hooper, 60 F. 2d 737 (2nd Cir. 1932), cert. denied 287 U.S. 662, 53 S. Ct. 220.

There, Judge Hand, unaided by case precedent or statutory regulation, concluded that limitation was unavailable to a shipowner who failed to equip his vessel with

an operable radio. The case here is more compelling—the fathometer was required by Federal Regulation, 46 C.F.R. § 96.27-1:

“(a) All mechanically propelled vessels in ocean or coastwise service of 500 gross tons . . . shall be fitted with either an electronic or mechanical deep sea sounding apparatus in addition to deep sea hand leads . . .”

That the CHICKASAW was not suitably equipped with required sounding equipment cannot be doubted. The deep sea sounding machine had been sold for scrap, and the fathometer had expired from old age.

The duty to provide seaworthy equipment includes a duty to maintain it.

Coleman v. Jahncke Service, Inc., 341 F. 2d 956 (5th Cir. 1965), cert. denied 382 U.S. 974, 86 S. Ct. 538 (1966);

Henson v. Fidelity & Columbia Trust Co., 68 F. 2d 144, 145 (6th Cir. 1933), rehearing denied 69 F. 2d 778 (6th Cir. 1934);

The T. J. Hooper, 60 F. 2d 737 (2nd Cir. 1932);

Compania General De Tabacos De Filipinas v. United States, 49 F. 2d 700 (2nd Cir. 1931);

Gunnarson v. Robert Jacob, Inc., 94 F. 2d 170 (2nd Cir. 1938), cert. denied 303 U.S. 660, 58 S. Ct. 764, rehearing denied 304 U.S. 588, 58 S. Ct. 945 (1938);

Kulack v. The Pearl Jack, 79 F. Supp. 802 (W. D. Mich. 1958); aff'd 178 F. 2d 154 (6th Cir. 1948);

The Pegeen, 14 F. Supp. 748 (S.D. Calif. 1935).

If the rule were otherwise, a shipowner could, as appellant claims, turn every phase of the ship's operation over to the master and blame any casualty on poor seamanship. The simple answer to this is that:

“[T]he navigation of a ship defectively equipped by a crew aware of her condition does not relieve the owner of his responsibility or transfer unseaworthiness into bad seamanship.” *The Maria*, 91 F. 2d 819, 824 (4th Cir. 1937).

To sum up here: the condition of the fathometer, as found by the court, coupled with a practice of no inspection for years, establish want of due diligence and privity, as found by the court. It will be found that the judgment is equally sustained by the “even if” findings.

IV.

The “Even if” Finding: Waterman’s Responsibility for the Master.

In addition to finding that the fathometer was *actually* unseaworthy, the court stated an alternative ground both of liability and for denial of limitation. It found that:

“Even if the deficiency of the fathometer had been temporary only and even if the fathometer would have worked if it had been used, to leave port without checking it or repairing it was to leave port with the vessel in an unseaworthy condition for the reason that Jensen in his then state of knowledge as respects the fathometer, could not have been expected to use or rely upon it.” [Find. 4, Clk. Tr. p. 846].

The court then went forward and found that Patronas failed to exercise due diligence in that he did not clear up this situation. Finding 5 [Clk. Tr. p. 847] says:

“Captain Patronas failed to exercise due diligence to make the fathometer seaworthy because, with knowledge of the uncertainty with respect to its condition, he took no steps to repair or check it.”

Finally, in the first paragraph of Finding 6 [Clk. Tr. p. 847] this is tied back to Waterman. The court found:

“It was the Waterman Steamship Corporation’s obligation to exercise due diligence to make the S.S. CHICKASAW seaworthy at the commencement of the voyage from the Far East. This included an obligation that the ship’s navigational equipment be put in a suitable state of repair before going to sea. Waterman Steamship Corporation operated a regularly scheduled service, carrying cargo from all the Far East ports for regularly commenced voyages, and it had a general agent in the Far East, Everett Steamship Corporation, which performed the function of the owner only as respects scheduling cargo, arranging stevedoring, tug and other necessary services. Waterman Steamship Corporation did not give Everett authority to direct repairs. *As to repairs, Waterman placed all authority, including authority to decide whether repairs should be made at all, with the master,* and had in the Far East no supervisory or managerial personnel to carry out its obligation to exercise due diligence to make the

vessel seaworthy. *Waterman therefore had delegated to the master its entire managerial responsibility as respects such repairs at the commencement of this voyage and therefore Waterman had knowledge, privity and is at fault for the decision not to repair the fathometer.*" (Emphasis added).

It is clear (and not contested by appellant) that liability arises because when the CHICKASAW sailed, its crew believed, even if incorrectly, that the fathometer was useless. This is a classic example of what is called disabling want of knowledge.

Standard Oil Company of New York v. Clan Line Steamers, Ltd. [1924], A.C. 100, [1924] S.C. (H.L.) 1;

The Silver Palm, 94 F. 2d 776 (9th Cir. 1937), cert. denied 304 U.S. 576, 58 S. Ct. 1046 (1938);

The Union Reliance, 222 F. Supp. 874 (S.D. Tex. 1963), aff'd 364 F. 2d 769 (5th Cir. 1966), cert. denied 386 U.S. 933, 87 S. Ct. 955 (1967).

Logically, as these cases hold, if the ship's personnel lack the requisite knowledge to operate required equipment, or, as here, are permitted to believe it will not operate, the ship is every bit as unseaworthy as when the equipment is in fact inoperative.

While liability is conceded, appellant urges that these facts do not preclude limitation of liability.

It is of particular importance to note, in this connection, that Waterman does not challenge the *factual* correctness of the finding that comprehensive authority

was given the master. It is not argued that these findings are "clearly erroneous" or erroneous at all. There is therefore presented a square question of law: is the owner liable for the acts of the person to whom it has given all the authority there is in the company respecting maintenance and repairs—respecting seaworthiness in the most basic sense? To those questions, we believe, there can be only one answer: the responsibility of a shipowner for the acts of an agent (and a corporation acts only by agents) is determined by function: the actual authority of the agent. What his *title* is has nothing to do with the matter; and the owner is liable, without limitation, for the neglect of the person who is placed in charge of maintenance. Discussion of that liability requires us briefly to follow the growth of the law.

The limitation of liability act was enacted in 1851, when most ships were operated by individuals, not corporations. As applied to individuals, the term "without the privity and knowledge of such owner or owners" [46 U.S.C. Section 181] is relatively easy to apply: the distinction is between a man's own knowledge and that of his agents. (The cases indicate that an agent with general authority, even in the case of an individual, may be identified with the individual: we are not concerned with that problem here.)

In the case of a corporation, this simple rationale does not work. A corporation can only act through agents. There can be no distinction between the knowledge of a corporation and that of its agents: the two are identical. And so, in the case of a corporation, more clearly than in the case of individuals, there has had to be a distinction between agents. This is spelled

out in general terms in *Coryell v. Phipps*, 317 U.S. 406, 410, 63 S. Ct. 291, 293 (1943), as follows:

“ . . . A corporation necessarily acts through human beings. *The privity of some of those persons must be the privity of the corporation else it could always limit its liability.* Hence the search in those cases to see where in the managerial hierarchy the fault lay.

“In the case of individual owners it has been commonly held or declared that privity as used in the statute means some personal participation of the owner in the fault or negligence which caused or contributed to the loss or injury.”

The first case in the Supreme Court dealing with applicability of the act to a corporation was *Craig v. Continental Insurance Company*, 141 U.S. 638, 12 S. Ct. 97 (1891). It said that:

“When the owner is a corporation, the privity or knowledge must be that of the managing officers of the corporation.” [12 S. Ct. at 99]

It was ultimately found that the offenders involved were not agents of the corporation at all, so limitation was granted.

Craig speaks of “officers” of the corporation. But it came to be realized that function, not title, is what counts. The leading early case on the point, still frequently cited, is *In P. Sanford Ross*, 204 Fed. 248 (2nd Cir. 1913). The case involved a pile driver barge which lacked an essential part. One Campbell was a “superintendent” whose job it was to see that these vessels were repaired. He knew of the missing part.

The court reversed the District Court (which had allowed limitation of liability), saying:

“The petitioner is apparently a large corporation having different departments of business, over one of which Campbell was superintendent. It is not satisfactorily shown that any duly elected officers of the corporation had any duty of inspecting the pile driving plant under him. There is not proof that the pile driver, either as part of the structure or of the equipment, ever had a chock-block and Campbell certainly was aware of its condition. Under such circumstances we still think he was such a representative of the corporation that his knowledge was imputable to it. While the cases generally speak of the knowledge of managing officers as being the knowledge of the corporation, the real test is not as to their being officers in a strict sense but as to the largeness of their authority.” [204 Fed. at 251.]

The remainder of the opinion is also strikingly pertinent. The court continued at page 251:

“The petitioner further urges that we should now take further testimony as to the authority actually possessed by Campbell. It is possible that we should give weight to this request were it not for another consideration which we did not lay stress upon in the opinion. It is entirely clear from the testimony, as already pointed out, that this vessel which was rebuilt by the petitioner as a pile driver had been lacking in a chock-block for five years before the accident. Whatever may have been the authority of the superintendent, the corporation must be presumed to have had knowledge

of such condition, and this presumption is not overcome by general statements of the elected officers that they kept the vessel in good repair and knew of no defects in it."

Two years later *P. Sanford Ross* was followed by the decision of Judge Hough, one of the great admiralty Judges of the past, in *Argent*, 1940 A.M.C. 508 (S.D.N.Y. 1915). Tradition has it that *Argent* was finally reported in 1940 because for twenty-five years, counsel had cited it from copies of the opinion, informally circulated. In that case, a company had directed a person described simply as an "employee", one Conway, to maintain the boat. The company was charged with his knowledge and limitation denied. As in *P. Sanford Ross*, the alternative grounds were (a) that the person charged with maintenance is the "managing agent", or (b) that the owner is charged with knowing what it would have learned if it asked. Again, in *The Rambler*, 290 Fed. 791 (2nd Cir. 1923), the testimony was that the engineer charged with inspecting a certain boiler must have known of an unlawful practice of tying down the safety valve. It was held that his knowledge would charge the company. [The finding as to the practice was rejected however, and therefore the case reversed: here, however, the findings are not even contested].

In 1937, in the *Silver Palm*, 94 F. 2d 776 (9th Cir. (1937), cert. denied 304 U.S. 576, 58 S. Ct. 1046 (1938), this court had before it a case where a master had not been properly instructed as to the reversing characteristics of an engine. The claim was that responsibility had been delegated to another corporation,

hence the owners were not privy. The court rejected the claim, saying:

“In proceedings for limitation the owner may not escape liability by giving the managerial functions to an employed person acting as its agent, whether the person be corporate or otherwise. So far as concerns privity and knowledge, such an agent is its alter ego.” [94 F. 2d at 780]

In 1957 and 1958, this court decided the *Pennsylvania (States Steamship Company) v. United States*, 259 F. 2d 458 (9th Cir. 1958). In that case, privity was found on the basis of the knowledge of one Valet, on the basis of his testimony that, “*I am in charge of the maintenance and repair of all vessels.*” [259 F. 2d at 465] (Emphasis added).

His knowledge sufficed. In precisely the same way, the record, in our case, is unequivocal that Patronas was “in charge of the maintenance and repair” of the navigation equipment on the CHICKASAW. If not he, there was no one.

Following *Pennsylvania*, in *Porto Rico Lighterage Co. v. Capital Construction Co.*, 287 F. 2d 507 (1st Cir. 1961), cert. den. 358 U.S. 933, 79 S. Ct. 316 (1959), the first circuit indicated that as to “seaworthiness, as to which petitioner had an affirmative duty” knowledge of the “superintendent” responsible for the repairs, would suffice. The “superintendent” in question was the mechanic who made the repairs.

Other cases denying limitation on the basis that the owner has the knowledge of whoever he puts in charge of repairs are:

Calvert, 51 F. 2d 494 (4th Cir. 1931);

Great Atlantic & Pacific Tea Co. v. Brasileiro,
159 F. 2d 661 (2nd Cir. 1947), cert. denied
67 S. Ct. 1519, 331 U.S. 836 (1947);

Petition of Converse, 1932 A.M.C. 1492 (2nd
Cir. 1932);

Tug Carric Mack-Barge 204, 194 F. Supp. 383
(S.D. Ala. 1961);

In re Petition of Henry Du Bois' Sons Co.,
189 F. Supp. 400 (S.D.N.Y. 1960);

In re Jacobson, 52 F. 2d 179 (S.D. Tex. 1931);

City of Brunswick, 6 F. Supp. 597 (D.C. Mass.
1934).

And see:

Midland Victory, 178 F. 2d 234 (2nd Cir.
1949); and,

In Re Pacific Mail S.S. Co., 130 Fed. 76 (9th
Cir. 1904), cert. denied 195 U.S. 632, 25 S.
Ct. 790 (1904).

These authorities dispose of petitioner's third assignment of error that the trial court wrongly "assumed" that there is a "non-delegable-duty . . ." to make the vessel seaworthy. No such assumption is made in the findings. Rather, it is found that the duty to make the vessel seaworthy exists [Find. 6], and that Waterman is liable for the acts of the person to whom a comprehensive grant of authority is made: an incontestable proposition under these authorities.²

²In *The Pennsylvania*, 259 F. 2d 458, Cert. denied 358 U.S. 933, 79 S. Ct. 316 (1959), at p. 472, in note 2, this court appears to us to have held that the duty of making the ship seaworthy "in the primitive sense" is not delegable. We adopt that

There can be no question, then, that the owner is privy to the knowledge of the person who is in charge of maintenance and repairs. What follows here? The court found "as to repairs . . ." Waterman had delegated "*all authority, including authority to decide whether repairs should be made at all*" to the master.

And the court found Waterman had delegated to the master "*its entire managerial responsibility as respects repairs.*" The factual correctness of that finding is not attacked: nowhere is it assigned as error that this finding is clearly erroneous. If Patronas had been entitled "Port Captain", "Superintendent", or something else, on this finding, indisputedly his knowledge binds the owner. Does it make any difference that he was also master?

Precisely this point was answered in

Austerberry v. U.S., 169 F. 2d 583 (6th Cir. 1948).

In that case, the Coast Guard entrusted a bos'n's mate with the responsibility of laying up a 32 foot motor-boat. The vessel carried a crew of four: the bos'n's mate was master. When she was laid up, her engine was removed, but gasoline was left in the fuel line and tank. A fire resulted. Limitation of liability was

view: in view of the findings below, it is not necessary to go into that point here.

There was a view expressed in many of the earlier limitation cases to the effect that "appointment of a competent person" *i.e.*, a comprehensive delegation of authority, did relieve the owners. Under the cases cited in the text, that point of view had died long ago.

denied (reversing the District Court), the court saying:

“A corporation, as does the government in this case, acts through human beings. The privity of some of those persons must be the privity of the government, else it could always limit its liability. As the Supreme Court said in a similar case involving a corporation: ‘Hence the search in those cases to see where in the managerial hierarchy the fault lay.’ *Coryell vs. Phipps*, *supra*, 317 U.S. p. 411, 1943 A.M.C. p. 22. ‘While the cases generally speak of the knowledge of managing officers as being the knowledge of the corporation, the real test is not as to their being officers in a strict sense but as to *the largeness of their authority*.’ *In Re P. Sanford Ross, Inc.*, 204 Fed. 248, 251 (2 CCA). (Emphasis added)

“The burden was upon the government to prove that it had no privity or knowledge of negligence, or that there was no privity or knowledge or the means of knowledge of negligence on the part of those *to whom it had delegated the duties of commanding, maintaining, and operating the vessel*. *Coryell v. Phipps*, 317 U.S. 406, 1943 A.M.C. 18; *The Cleveco*, 154 F.2d 605 (6th Cir. 1946).

* * *

“There was no evidence of any such inspection. In the light of the proofs, strong inferences of negligence can be drawn from the leaving of gasoline in the exposed tubing, after the removal of the engine. There is no evidence that anyone in charge of the vessel for the government was interested in taking any precautions in this regard.” [169 F. 2d at 594].

Every word of that case fits here.

Again, in *Petition of Oskar Tiedemann and Company*, 179 F. Supp. 227, 236 (D.C. Del. 1959), aff'd., 289 F. 2d 237 (3rd Cir. 1961), the court says:

"It is elementary in Admiralty law that if, when a ship leaves port, the owner, master, etc., knew or should have known that she was unseaworthy due to some unsafe condition, or was improperly equipped or manned, and loss of life, personal injury or property damage results therefrom, he is not entitled to limit his liability. The *Cleveco*, 6 Cir., 154 F.2d 605."

To the same effect is *Petition of United States*, 105 F. Supp. 353, 369 (S.D.N.Y. 1952), wherein Isbrandtsen was denied limitation of liability because of the acts of an agent in charge of loading [This portion of the District Court's opinion was approved, but liability otherwise restricted in 201 F. 2d 281 (2nd Cir. 1953), on other bases.]

Mixed with the cases stating the rule that the owner is charged with the knowledge of his servants, there are repeated references to his own duty to know. In *The Vestris*, 60 F. 2d 273 (S.D.N.Y. 1932) there was a pattern of overloading, and it was held that owners should have known. In *Argent*, 1940 AMC 508, 509 (S.D.N.Y. 1915) there was an unlawful light, the court saying:

"If lack of actual knowledge were enough, imbecility, real or assumed, would be at a premium."

Other cases to the same effect are:

Great Atlantic & Pacific Tea Co. v. Brasileiro,
159 F. 2d 661, 664 (2nd Cir. 1947), cert.
denied 331 U.S. 836 (1947);

Dexter-Carpenter Coal Co. v. New York, O. & W. Ry. Co., 50 F. 2d 270, 271 (S.D.N.Y. 1931).

Which doctrine is followed hardly matters; no case for limitation is made here. All this is not to say that an owner is liable, without limitation, for every act of a master. The fault of appellant's entire argument is that they fail to distinguish between the master, acting as a seaman, and a master, to whom the owner has transferred *his* job. The line of distinction is between the two basic responsibilities of maritime transport. We are concerned with the owners job—the duty to provide a sound ship. If he gives the job of providing a safe ship to someone else, he is liable for that person's acts.

“The principle of the Limitation Act is the same as that found in the Harter Act and the Carriage of Goods by Sea Act: because of the extraordinary hazards of seaborne commerce and because the owner can exercise only a nominal control over his “servants” once the ship has broken ground for the voyage, the owner should be entitled to exoneration from liability, or at least to a limitation of liability, for whatever happens after the ship has passed beyond his effective control. *Contrariwise, he should be held to liability for all loss resulting from his failure to exercise effective control when he had the chance.*” [*The Pennsylvania (States Steamship Company) v. The United States*, 259 F. 2d 458, 474 (9th Cir. 1957), cert. denied 358 U.S. 933, 79 S. Ct. 316 (1959)].

We are *not* concerned with the seaman's job—the loading and sailing of the ship—once the owner has pro-

vided a sound ship. An error in loading cargo, or error in navigation when at sea is the sort of fault to which the limitation act is directed. That was made perfectly clear by this court in *Admiral Towing Company v. Woolen*, 290 F. 2d 641 (9th Cir. 1961), in discussing the case of an individual owner.³ As to an individual, the court observed:

“There will surely come a case where the unlimited agent is the master of the vessel and the causative negligence is an error in seamanship resulting from a spur of the moment decision. To impute the master’s mistake to the shipowner in such a situation simply because the master has been given broad and unlimited agency powers over the operation and maintenance of the vessel, would be to rob the shipowner of just that protection which the Limitation Act was apparently designed to afford him: *immunization from instantaneous negligence on the part of the master at sea, negligent behavior over which the shipowner could not possibly exercise control.*” [290 F. 2d at 648] (Emphasis added).

The court then went on to decide the case on the familiar ground that the owner had, but did not use the “means” of knowledge. But the case defines sharply and clearly the distinction between providing a safe ship—where the owner *must exercise control*, and is liable for the acts of whoever he gives control to—and instantaneous negligence—for which the owner is not liable.

³Privity is imputed less freely in the case of an individual owner than a corporation: a corporation always acts by agent and an agent’s knowledge must be that of the owner. In the case of an individual this is not so. See Gilmore and Black, *The Law of Admiralty* (1957), p. 700: *Coryell v. Phipps*, 317 U.S. 406, 411, 63 S. Ct. 291, 293 (1943).

Because the master's function is normally that of the seaman, inevitably, there are numerous cases granting limitation for his faults. We know of no such case, however, wherein he had the authority disclosed by our record. As we have seen, the authorities are the other way.

Do any of Waterman's authorities suggest that the master does not count if he is given complete charge of all repairs: complete responsibility to decide if the ship shall or shall not be seaworthy? None of them even involve the problem—not one involves an owner who never troubled to inquire into seaworthiness: an owner who simply left the ship's condition up to the master.

Appellant places particular reliance upon the case of *Earle & Stoddard v. Ellerman's Wilson Line*, 54 F. 2d 913 (1931), affirmed 287 U.S. 420, 77 L. Ed. 403 (1932). But that is a fire statute case involving a chief engineer who negligently overstowed new coal over old, causing fire. That is a perfect example of the "instantaneous negligence" for which limitation is granted. But the case is plain that the owner would not have been granted limitation if there had been a failure to provide suitable equipment. The court said:

" . . . [I]n the case of *The Malcolm Baxter, Jr.*, as appears from the decision of the District Court, 55 F.(2d) 312, the vessel's hull had defects which an inspection would have disclosed, but the owner did not provide a suitable person to inspect the vessel, which it had purchased without any warranty of seaworthiness in the bill of sale. *Hence the lack of diligence was the owner's, and the loss resulting from unseaworthiness was within the owner's 'privity.'*" [54 F. 2d at 915] (Emphasis added).

Can one imagine a more perfect description of our case?

Appellant next cites *The Yungay*, 58 F. 2d 352 (S.D.N.Y. 1931) for the proposition that the negligence of the master can never be at bar to limitation. There, an individual owner testified that he instructed the master to compensate the ship's compass. The master did not. Limitation was granted—the owner had done what he could. Where are the instructions here? The only instruction proved was "*No Repairs Except Real Emergency*" [Cl. Ex. 92]—hardly an excuse.

Yungay should be considered with

Coleman v. Jahncke Service, Inc., 341 F. 2d 956 (5th Cir. 1965), cert. denied 382 U.S. 974, 86 S. Ct. 538 (1966)

where limitation was denied for lack of a property calibrated compass.

The distinction between these two cases lies in the "control" exercised, to use the term of *The Pennsylvania*. In *Yungay*, the owner instructed the master, a competent person, to do the job. In *Coleman*, the owner left it to the master to determine the compass deviation [error caused by the ship's magnetic field] when any inquiry would have revealed the master did not have "... the slightest understanding of the workings of a compass or how to compensate for the factors that effected its performance." [341 F. 2d at 958.]

Petition of Kinsman Transit Company, 338 F. 2d 708 (2nd Cir. 1964), is equally remote from our facts. It is another case of the "instantaneous negligence" of a seaman—the case of a master who failed to moor a vessel properly, so that ice carried it away.

And, like appellant's other authorities, *Kinsman* makes it perfectly clear that if the shipowner had failed to provide a sound ship (through whatever instrumentality) limitation would not be granted. The court said [338 F. 2d at 716]:

"Two other points must be considered. If the Shiras was not seaworthy in what has been termed the 'primitive sense' of being 'tight, staunch, strong and well and sufficiently tackled, appareled, furnished and equipped,' a corporate owner who has failed in his duty to provide such a ship does not escape full liability. *Gilmore & Black, supra*, 702." (Emphasis added).

The *ARIEL*, 33 F. Supp. 573 (S.D.N.Y. 1940), aff'd 119 F. 2d 866 (2nd Cir. 1941), cited without comment by appellant on page 39 of its brief, involved a fishing vessel that failed to return to port following a severe hurricane. The court never really got to the question of limitation, as it found that there was no evidence of unseaworthiness and granted complete exoneration. The same is true of *Hartford Accident & Indemnity Co. v. Gulf Reining Co.*, 230 F. 2d 346 (5th Cir. 1956), cert. denied 352 U.S. 49, 77 S. Ct. 419 (1956). There, the Fire Statute was first asserted as a defense on appeal. The case was remanded with directions to take evidence on the point [230 F. 2d at 356].

Few things are more ironic in this case than appellant's reliance on Judge Leonard Hand's words in

Moore-McCormack Lines, Inc. v. Armco Steel Corp., 272 F. 2d 873 (2nd Cir. 1959) cert. denied 362 U.S. 990, 80 S. Ct. 1079 (1960)

that "it was left to those in charge to follow these instructions . . ."—instructions which called for a specified stowage practice. *Where are instructions here?* "*Make No Repairs . . .*"—this will hardly do. What else is there? Beyond that, *Moore-McCormack* is another of the cases which consistently recognizes that the owner *cannot* limit where he provides defective equipment at the start of a trip. The District Court found that the steamship company had provided a defective "stabilogauge", a defective item of equipment, and denied limitation. The Appellate Court found the gauge was good and granted limitation. But the opinion leaves no doubt that had the evidence established that the gauge was bad, limitation would have been denied.

The remaining cases cited by appellant are similar. While appellant seeks refuge in the law to avoid the consequences of its complete indifference toward the CHICKASAW's navigational equipment, it has not found an ally. The law is never fooled by titles, be it vice president, superintendent, port captain, agent or master: ". . . it is the largeness of authority which counts." [*In Re Stanford Ross, supra*], "Privity like knowledge turns on the facts of particular cases." [*Coryell v. Phipps, supra*]. If on "the facts" there was a "failure to exercise effective control" [*Pennsylvania (States Steamship Company v. The United States), supra*], limitation must be denied. The findings, that there was such a failure, are not even contested.

V.

**The Judgment Must Be Affirmed Because Appellant
Has Not Sustained Its Burden of Proof Neither
With Respect to Showing Due Diligence nor
Want of Knowledge and Privity.**

This is a case where the unseaworthiness of the vessel is conceded. At the least, the fathometer was in such a condition that it could not be expected to operate consistently. It was corroded, its terminals loose, and it was generally in bad repair. It had not in fact been inspected and repaired for at least five years. Its failure was attributable to inattention and indifference.

The law is clear that where unseaworthiness exists, the shipowner carries the burden of proving due diligence to avert the defective condition. 46 U.S.C.A. § 1304(1); *Ionian S.S. Co. of Athens v. United Distillers*, 236 F. 2d 78 (5th Cir. 1958).

There is no evidence of any diligence at all in this record, and therefore the burden was not carried. The evidence is all to the contrary.

Beyond that, it is equally clear that Appellant, on a petition for limitation of liability, carries the burden of proving that any unseaworthiness exists without its knowledge and privity.

Coryell v. Phipps, 317 U.S. 406, 409, 63 S. Ct. 291 (1943);

Pennsylvania (States Steamship Company) v. United States, 259 F. 2d 458, 464, 466, 474 (9th Cir. 1958), cert. denied 358 U.S. 933, 79 S. Ct. 316 (1959);

The E. Madison Hall, 140 F. 2d 589, 591 (4th Cir. 1944) cert. den., *W. E. Valiant Co. v.*

Raynoier, Inc., 322 U.S. 748, 64 S. Ct. 1159 (1944);

The Silver Palm, 94 F. 2d 776, 777 (9th Cir. 1937) cert. den. 304 U.S. 576, 58 S. Ct. 1046 (1938).

The only showing in this case is that petitioners never did anything with respect to the fathometer except paint it. Under the authorities collected in Part III of this brief, that is no showing at all.

VI.

The Judgment Should Be Affirmed by Reason of the Condition of the Radio Direction Finder.

The function of a radio direction finder has been described. Essentially it is a device for locating one's position by taking directional bearings on beacons. In order to use it, it is necessary to have data with respect to the error of the particular machine on a particular ship in different directions. 1961 regulations, having the force of law, required that such data be obtained annually. They read as follows:

“§ 8.517 *Requirements for direction-finder.* (a) To be approved by the commission, as provided by § 8.516. . . .

* * *

“(b) The calibration particulars shall be checked at yearly intervals or as near thereto as possible. A record of the calibration of any checks made of their accuracy shall be maintained on board the vessel for a period of not less than 1 year from the date of the related action.” [47 C.F.R. § 8.517(a) and (b)] .

There is no question, but that the only data on board was a table five years old [Rep. Tr. pp. 346-347], which nobody knew how to use [Rep. Tr. p. 243].

The court made the following finding with respect to the radio direction finder:

"[N]o reasonably expected deviational error could account for the widely divergent and inconsistent fixes which the crew obtained. If the incorrect fixes obtained from the radio direction finder contributed to the grounding, these fixes were due to the negligence by the members of the crew and are not due to any failure to have an up-to-date deviation card aboard." [Find. 8, Clk. Tr. p. 849].

We respectfully submit that the finding that the wildly divergent and inconsistent fixes obtained were due to the negligence of the crew does not dispose of the matter.

The case is governed by the rule of *The Pennsylvania* [*The Pennsylvania v. Troop*, 86 U.S. 148, 19 Wall. 125 (1873)]. That rule is that an offending ship-owner must prove that a statutory violation could not possibly have caused a casualty.

The E. Madison Hall, 140 F. 2d 589 (4th Cir. 1944), cert. den. 322 U.S. 748, 64 S. Ct. 1159 (1944);

The Denali, 105 F. 2d 413 (9th Cir. 1939), cert. denied 311 U.S. 687, 61 S. Ct. 65 (1949).

In both of these cases, as here, the vessel owner sought to limit liability for damages caused by stranding. In both, the court concluded the *Pennsylvania*

Rule was applicable. In *Denali*, this court, in reversing the lower court's judgment granting limitation, said:

"It is not conceivable that the Congress intended to give to such wrongdoing shipowners the extraordinary relief of the limitation act, with a less burden of proof relative to the effect of their wrongdoings, than for other violations of statutes for the safety of life and property at sea. Hence the extreme burden of proof of the *Pennsylvania* and *Lie* cases, *supra*, rested on the company to show that its privity in and knowledge of the violation of the statute could not have contributed to the stranding. As shown it has not made such proof. We hold that the Steamship Company is not entitled to limit its liability to the owners of the cargo under the provision of the Limitation of Liability statute and that the district court erred in its findings and decision to the contrary." [105 F. 2d at 420].

Accord:

The Teaser, 246 Fed. 219 (3rd Cir. 1917); *New York P. & N. R. Co. v. Wilkins*, 257 Fed. 42 (4th Cir. 1919), cert. denied 249 U.S. 605, 39 S. Ct. 288 (1919); *The Martello v. The Willey*, 153 U.S. 64, 14 S. Ct. 723 (1894); *The Bolivia*, 43 Fed. 173 (E.D.N.Y. 1890), reversed on other grounds, 49 Fed. 169 (2nd Cir. 1891); *The M. M. Chase*, 37 Fed. 708 (S.D.N.Y. 1889); and, *Andros Shipping Co. v. Panama Canal Co.*, 298 F. 2d 720 (5th Cir. 1962).

Both Captain Slack, appellant's expert [Rep. Tr. p. 539], and our expert, Captain De Santi [Rep. Tr. p. 793], agreed that without the correction data required by law, the radio direction finder is useless.

It is hardly to be supposed that seamen would use an instrument carefully, when they know that the readings obtained from it are without value. The radio direction finder was the device which was being used to navigate at the time of the grounding: its inadequacy must be presumed to have contributed to the casualty. There is no evidence to the contrary: since the instrument was useless, the admitted negligence of the crew is not such evidence.

Summary and Conclusion.

This is a case unique for the pervading atmosphere of mismanagement, incompetence, and inattention to the essentials of maritime safety. It is a case where the fathometer is conceded to have been the immediate cause of stranding. It is a case where it is conceded that the instrument was in an appalling state of disrepair. It is a case where the court expressly found that the unseaworthiness of the ship existed with the privity of Appellant. It is a case where the evidence to support that finding is overwhelming. We respectfully submit therefore that the judgment should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JACK D. FUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of the Petition of
WATERMAN STEAMSHIP CORPORATION, a
corporation, owner of the vessel
SS CHICKASAW, for exoneration from
and limitation of liability.

GAY COTTONS, INC., et al.,
Cargo Claimants,
SALOM BABY WEAR,
Cargo Claimant,
UNITED STATES OF AMERICA,
Cargo Claimant.

NO. 21767

FILED

JAN 29 1968

WM. B. LUCK, CLERK

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STATUTES AND REGULATIONS CITED

The Carriage of Goods by Sea Act, Title 46 U.S.C.

§ 1304. Rights and immunities of carrier and ship.

(1) Unseaworthiness.

Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) Uncontrollable causes of loss.

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from--

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the

navigation or in the management of the ship;

* * * * *

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

* * * * *

(4) Deviations.

Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: Provided, however, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

* * * * *

(6) Inflammable, explosive, or dangerous cargo.

Goods of an inflammable, explosive, or dangerous

nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

Limitation of Vessel Owner's Liability, Title 46 U.S.C.

§ 183. Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel."

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss,

damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

* * * * *

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a sea-going vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

Telegraphs, Telephones, and Radiotelegraphs, Title 47 U.S.C.

§ 351. Vessels required to install equipment.

(a) Except as provided in section 352 of this title, it shall be unlawful--

* * * * *

(2) For any ship of the United States of sixteen hundred gross tons, or over, to be navigated outside of a harbor or port, in the open sea, or for any such ship of the United States or any foreign country to leave or attempt to leave any harbor or port of the United States for a voyage in the open

sea, unless such ship is equipped with an efficient radio direction finding apparatus (radio compass) properly adjusted in operating condition as herein-after provided, which apparatus is approved by the Commission: Provided, That the Commission may defer the application of the provisions of this section with respect to radio direction finding apparatus to a ship or ships between one thousand six hundred and five thousand gross tons for a period not beyond November 19, 1954, if it is found impracticable to obtain or install such direction finding apparatus.

Title 47 C.F.R.

§ 8.516 Direction-finder. Each ship of 1600 gross tons or over which is subject to the requirement set forth in subparagraph (a)(2) of section 351 of the Communications Act or which is subject to Regulation 12 of Chapter V of the Safety Convention shall be equipped with an efficient direction-finder (radio compass) properly adjusted in operating condition and approved by the Commission.^{1/}

^{1/} This regulation, with minor changes, is now set forth at 47 C.F.R. § 83.458.

§ 8.517 Requirements for direction-finder. (a)

To be approved by the Commission, as provided by § 8.516, the radio direction-finder (radio compass) shall:

* * * * *

(b) The calibration of the direction-finder shall be verified whenever any changes are made in the physical or electrical characteristics or the location of any antenna(s) on board the vessel, or whenever any changes are made in any structure(s) on deck, which might appreciably affect the accuracy of the direction-finder. The calibration particulars shall be checked at yearly intervals or as near thereto as possible. A record of the calibration of any checks made of their accuracy shall be maintained on board the vessel for a period of not less than 1 year from the date of the related action.^{2/}

Title 46 C.F.R. 96.27--Sounding Equipment

§ 96.27-1 When required.

(a) All mechanically propelled vessels in ocean or coastwise service of 500 gross tons and over, and all mechanically propelled vessels in Great Lakes

^{2/} This regulation, with minor changes, is now set forth at 47 C.F.R. § 83.459.

service of 1,500 gross tons and over, except paddle wheel vessels, shall be fitted with an efficient mechanical or electronic deep-sea sounding apparatus in addition to the deep-sea hand leads. On Great Lakes vessels, a shallow water alarm may be substituted.^{3/}

^{3/} As published in 23 Federal Register 4676, June 26, 1958.

OPINION BELOW

The opinion of the District Court, Honorable
Jesse W. Curtis, United States District Judge for the
Central District of California, is reported at
265 F.Supp. 595, 1966 A.M.C. 2219.

JURISDICTIONAL STATEMENT

The jurisdiction of the Court below was founded upon 28 U.S.C. 1333 and former Rules 51 to 55 of the Supreme Court Rules of Practice in Admiralty and Maritime Cases (since July 1, 1966, Supplemental Rule F, Fed. R. Civ. P.).

Jurisdiction of this Court rests upon 28 U.S.C. 1292 (3) (see further Rule 73 [h], Fed. R. Civ. P.) by reason of a Notice of Appeal (R. 919), filed December 22, 1966, "from the Interlocutory Decree entered in this action on October 25, 1966."

STATEMENT OF THE CASE

To the extent the pertinent facts are not set forth in this brief, Appellee United States adopts the statement of the case in the answering brief of Appellee Gay Cottons.

ARGUMENT

I

The Lower Court's Denial of Exoneration from or Limitation of Liability by Reason of Waterman's Delegation of Authority to the Master and Waterman's Direct Fault is in Full Accord with Existing Law.

A. Nondelegability under COGSA/Harter Act and Appellant's Argument based thereon.

It has been settled law for years in Harter Act and COGSA cases that as between a shipowner and cargo the former's duty of making its ship seaworthy is a nondelegable one. Hence, the shipowner cannot defend on the basis that it had made a contract with a repair yard to repair and overhaul the vessel and that the yard had failed to perform its contract. It can only defend by showing that the yard had in fact performed its contract. Bethlehem Shipbuilding Corp. v. Joseph Gutrad Co., 10 F.2d 769, 771 (9th Cir. 1926); Standard Oil Co. v. Anglo-Mexican Petroleum Corp., 112 F.Supp. 360, 367 (SDNY 1953). Nor can the shipowner defend on the ground that the lack of due diligence to make and keep the ship fit and seaworthy was that of the vessel's master and crew. The Bill, 47 F.Supp. 969, 975-976 (D.Md. 1952), affirmed 145 F.2d 470 (4th Cir. 1944); The James Griffiths, 84 F.2d 785, 786 (9th Cir. 1936); Texas & Gulf SS Co. v. Parker, 263 Fed. 864 (5th Cir. 1920);

International Navigation Co. v. Farr & Bailey Mfg. Co.,
181 U.S. 226, 45 L.Ed. 830 (1900).^{4/} (As to incompetence
of the master precluding exoneration, see The Cygnet,
126 Fed. 742, 746 [1st Cir. 1903].)

"There 'must be due diligence in the work
itself, and not merely in the selection of agents
to do the work; otherwise, shipowners might
escape all responsibility merely by selecting
agents of good reputation, and would be relieved
(of liability) whether such agents exercised due

^{4/} "... The obligation was to use due diligence to make
her seaworthy before she started on her voyage, and the
law recognizes no distinction founded on the character of
the servants employed to accomplish that result.

"We repeat that, even if the loss occur through fault
or error in management, the exemption cannot be availed of
unless the vessel was seaworthy when she sailed, or due
diligence to make her so had been exercised; and it is for
the owner to establish the existence of one or the other of
these conditions. The word 'management' (in §3, Harter Act,
46 U.S.C. 192) is not used without limitation, and is not,
therefore, applicable in a general sense as well before as
after sailing." International Navigation Co. v. Farr &
Bailey Mfg. Co., supra, 181 U.S. at 226, 45 L.Ed. at 833-834.

care or not to make their vessel seaworthy, and any responsibility would be frittered away.'" Standard Oil Co. v. Anglo-Mexican Petroleum Corp., supra, 112 F.Supp. at 368.

Appellant insists that the Court below denied limitation of liability under 46 U.S.C. 183 (Conclusion of Law No. 3) because it had found, in Finding of Fact (hereinafter abbreviated as FF) No. 6, a breach of "COGSA's non-delegable duty to make seaworthy." It assigns this alleged basis for the finding as error. See Specification of Errors No. 3, p. 7, Opening Brief. See also Summary of Argument, p. 11, Opening Brief. Since the Trial Court found more than that the CHICKASAW left port in an unseaworthy condition and causation^{5/}, Appellant's position in this regard, in order to make sense, must be taken to be that the master's omission in regard to the maintenance of seaworthiness is attributable to the shipowner solely in COGSA and Harter Act cases because only under those statutes

^{5/} Findings that the vessel left port in an unseaworthy condition and that this was one of the causes of the loss are all that is necessary for denial of exoneration under COGSA. On appeal, these findings must be affirmed unless clearly erroneous. Artemis Maritime Co. v. Southwestern Sugar & Molasses Co., 189 F.2d 488, 490-491 (4th Cir. 1951). See also The Bill, supra, 47 F.Supp. at 975.

is the duty to use due diligence to prepare the vessel for sea nondelegable; that proof that the unseaworthiness was due to an omission of the master entitles Appellant to limitation as the master is not an "executive officer, manager, or superintendent" whose omissions cause denial of limitation.^{6/}

6/ This argument is very similar to that unsuccessfully made by the shipowner attempting limitation under 46 U.S.C. 183 in Petition of the United States (The Edmund Fanning), 105 F.Supp. 353, 369 (SDNY 1952), modified on other grounds 201 F.2d 281 (2d Cir. 1953):

"It is urged on behalf of Isbrandtsen (the shipowner) that even though it be found that Captain Praast was acting in such a capacity for Isbrandtsen as to preclude it from claiming exoneration under the Fire Statute, the evidence establishes that the home office of Isbrandtsen in New York had no knowledge of the improper stowage and that it was not done at their specific direction or expressed approval. But it has been found that Captain Praast was performing with authority duties of a managerial nature rather than merely functioning in a technical or clerical capacity. He was employed by Isbrandtsen in a capacity to make it chargeable with his faults and neglects. Cf. Williams S.S. Co., Inc. v. Wilbur, 9 Cir., 9 F.2d 622, certiorari denied 271 U.S. 666, 46 S.Ct. 482, 70 L.Ed. 1140;

As for the denial of exoneration itself, Appellant attacks this conclusion only insofar as causality is based on the deposition of Third Officer Jensen (p. 19, Opening Brief) and as it relates to cargo loaded aboard the CHICKASAW prior to December 25, 1961 (p. 20, Opening Brief).

In dedicating itself to these propositions of law, however, Appellant makes a significant omission: it fails to attack as clearly erroneous under the McAllister rule^{7/} any of the findings of fact in the case, which findings clearly establish more than adequate grounds for denial of both exoneration and limitation. Thus, as to unseaworthiness and causality, it was found by the Trial Court that the CHICKASAW's fathometer was unseaworthy "at the

6/ cont'd.

Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro, 2 Cir., 159 F.2d 661. Isbrandtsen is privy to the faults of Captain Praast so as to preclude it from claiming the benefits of the Limitation of Liability Act as well as the Fire Statute."

7/ McAllister v. United States, 348 U.S. 19, 99 L.Ed. 20 (1954); Admiral Towing Co. v. Woolen (The Companion), 290 F.2d 641, 646 (1961); States SS Co. v. United States (The Pennsylvania), 259 F.2d 458, 466, 1957 A.M.C. 2277 (9th Cir. 1957).

commencement of the voyage from each port in the Far East" (FF 4) because of long-standing neglect (FF 4) and a failure to have a specific malfunction repaired which had been observed on December 25, 1961, by Third Officer Jensen (FF 4) and reported to the master, Captain Patronis, and that the vessel was lost because of this unseaworthiness (FF 6).

The unseaworthiness was found to have been "with the privity, fault and knowledge of Waterman" (FF 6). FF 4 regarding the lack of general maintenance of the fathometer was the basis for the finding as to Waterman's direct fault.^{8/} However, as another basis for the conclusion

8/ Waterman chooses to argue that "only one negligent act is found. That act was the failure of Captain Patronas (sic) to exercise due diligence to make the fathometer seaworthy when, with knowledge of uncertainty with respect to its condition, he took no steps to repair or check it [Finding of Fact (5) R. 847]. Thus, limitation of liability could properly be denied only if Captain Patronas' negligence under the law is imputed to Appellant. Finding of Fact (6) R. 848 makes it explicit that no supervisory or managerial personnel were involved in Captain Patronas' negligence." (Opening Brief, p. 46.)

A fair reading of the findings, including FF 4, which

that Waterman was not entitled to limitation, it was also found that the CHICKASAW's master had been delegated by the shipowner the "managerial responsibility" of making the vessel seaworthy as to her navigational equipment, "including authority to decide whether repairs should be made," in foreign ports such as Yokohama where the company had no "supervisory or managerial personnel" (FF 6), that the CHICKASAW's master had failed to perform the above-mentioned managerial duty before commencement of the CHICKASAW's voyage across the Pacific (FF 5) and that his failure to make the vessel seaworthy was within the privity and knowledge of Waterman (FF 6).

It is clearly apparent, therefore, that the Trial Court covered all the elements needed for denial of limitation under the Limitation of Liability Act: loss due

8/ cont'd.

is not mentioned by Appellant in this regard, shows that this interpretation is incorrect and is an attempt to attack the finding of direct fault in a novel way: by treating it as non-existent. The record, as we will set out later, clearly shows why the finding of direct fault was made.

to negligence or fault of the shipowner, or occurring with the knowledge of the shipowner, or to which it is in privity.^{9/}

9/ "The right to limit liability turns upon whether such negligence was with the owner's privity or knowledge."

Spencer Kellogg & Sons v. Hicks (The Linseed King), 254 U.S. 502, 510, 76 L.Ed. 903, 911 (1931). Also, the owner who is directly at fault cannot have the benefit of limitation.

"It was not the intention of congress, by the provisions of sections 4283-4285 of the Revised Statutes, embodying provisions of the act of March 3, 1851, nor of any act amendatory thereof, to relieve shipowners of responsibility for their own willful or negligent acts." Parsons v. Empire Transp. Co., 111 Fed. 202, 208 (9th Cir. 1901).

See also American Car & Foundry Co. v. Brassert, 289 U.S. 261, 264, 77 L.Ed. 1162, 1165 (1932).

Further, since the American Limitation of Liability Act is based on the English statute (In re Eastern Transp. Co. [The Calvert], 37 F.2d 353, 363 [D.Md. 1929]; see also Deslions v. Cia. Gen. Transatlantique [The La Bourgogne], 210 U.S. 95, 120, 52 L.Ed. 973, 986 [1907]), we are entitled to examine English cases. (The English statute allows the shipowner limitation of liability for "any loss or damage happening without his actual fault or privity."

B. Privity and Knowledge under the Limitation of Liability Act are Imputable to the Shipowner through an Employee such as the Vessel's Master when the Latter has been Delegated a Managerial Responsibility.

While corporate shipowners are denied limitation of liability under 46 U.S.C. 183(a) for the neglect of the managing officers, these are defined as "anyone to whom the corporation has committed the general management or general superintendence of the whole or a particular part of its business." Petition of United States (The Edmund Fanning), 105 F.Supp. 353, 371 (SDNY 1952), modified on other grounds 201 F.2d 281 (2d Cir. 1953); The Marguerite,

9/ cont'd.

[See 11 Brit. Shipping Laws 323.]] In The Lady Gwendolen [1965] 1 Lloyd's List L.R. 335, 338 (C.A.), affirming [1964] 2 Lloyd's List L.R. 99, which case was called to the attention of the Court below, "Mr. Justice Hewson, a very experienced Admiralty Judge, ... found that the owners have not established that the loss occurred without their actual fault. No question of privity (therefore) arises." (The fault there was that of the owners in not exercising sufficient control over the master in matters of navigation by means of radar, since "the installation of radar requires particular vigilance of owners." [At p. 339.]])

140 F.2d 491, 493, 1944 A.M.C. 367 (7th Cir. 1944); In re Petition of Henry Du Bois' Sons Co., 189 F.Supp. 400, 402 (SDNY 1960). The "part of the business" with which we are concerned in this particular appeal is the keeping of navigational equipment aboard a vessel in a state of repair. (This function was found by the Court below--and properly so^{10/}--to be part of the managerial duty to make seaworthy; again, the finding has not been assigned as error.)

The shipowner, corporate or otherwise, cannot escape liability by means of the Limitation of Liability Act by giving a managerial function to an employed person acting as its agent. For purposes of establishing the shipowner's "privity or knowledge" under that Act, such a person is a "managing officer".

^{10/} "The tug owner has a duty ... to send the vessel out prepared to meet conditions which are likely to befall the vessel. It is the owner's duty to see to it that a vessel's equipment is in safe working order." Greater New Orleans Expressway Commission v. Tug Claribel, 222 F.Supp. 521, 1964 A.M.C. 967, 973 (ED La. 1963), citing In re Jacobson (The Edward), 52 F.2d 179, 1931 A.M.C. 1541 (SD Tex. 1931). Tug Claribel (sub nom. Coleman v. Jahncke Service, Inc.) was aff'd 341 F.2d 956 (5th Cir. 1965).

"While the cases generally speak of the knowledge of managing officers as being the knowledge of the corporation, the real test is not as to their being officers in a strict sense, but as to the largeness of their authority." In re P. Sanford Ross, 204 Fed. 248, 251 (2d Cir. 1913).

See also Austerberry v. United States (The C.G.R. 180), 169 F.2d 583, 594, 1948 A.M.C. 1682, 1699 (6th Cir. 1948) and Gilmore & Black, The Law of Admiralty (1957), pp. 698-699.

"... the scope of authority delegated by an individual owner to a subordinate may be so broad as to justify imputing privity (citation) as well as knowledge." Coryell v. Phipps (The Seminole), 317 U.S. 406, 411, 87 L.Ed. 363, 368 (1942).

Were the law otherwise, a shipowner could evade his responsibilities by assigning the task of making the ship seaworthy to mere employees. The courts have said over and over that this cannot be done. The Supreme Court did so in Spencer Kellogg & Sons v. Hicks (The Linseed King), 285 U.S. 502, 509-510, 76 L.Ed. 903, 911 (1931). This Circuit so stated in two cases, one being The Silver Palm, 94 F.2d 776, 780, 1937 A.M.C. 1462, 1469 (9th Cir. 1937):

"In proceedings for limitation the owner may not escape liability by giving the managerial functions to an employed person acting as its agent, whether the person be corporate or otherwise. So far as concerns privity and knowledge, such an agent is its alter ego."

In States SS Co. v. United States (The Pennsylvania), 259 F.2d 458, 470, 1957 A.M.C. 2277 (9th Cir. 1957), this above quote from The Silver Palm is repeated (minus the last sentence).

The Fifth Circuit agrees: "Where, as here, the owner is a corporation, privity or knowledge attributable to management (or those to whom the authority of management has been delegated) binds the corporation." Coleman v. Jahncke Service, Inc. (Tug Claribel), 341 F.2d 956, 958 (5th Cir. 1965). So does the Sixth Circuit. Austerberry v. United States (The C.G.R. 180), supra, 169 F.2d at 594; Cleveland Tankers, Inc. v. Szwed (The Cleveco), 154 F.2d 605, 613, 1946 A.M.C. 933 (6th Cir. 1946); In re Great Lakes Transit Corp. (The Glenbogie), 81 F.2d 441, 444, 1936 A.M.C. 267 (6th Cir. 1936). And the Seventh Circuit as well. The Marguerite, 140 F.2d 491, 493 (7th Cir. 1944). The Second Circuit and the Southern District of New York, where most of the admiralty decisions in the United States emanate, agree. Great Atlantic & Pacific Tea Co. v. Brasiliero,

159 F.2d 661, 664 (2d Cir. 1947), cert. denied sub nom.
Repub. of United States of Brazil v. Great Atlantic &
Pacific Tea Co., 331 U.S. 836, 91 L.Ed. 1849 (1947);
In re New York Dock Co., 61 F.2d 777, 779 (2d Cir. 1932);
In re Petition of Henry Du Bois' Sons Co., 189 F.Supp. 400,
401-403 (SDNY 1960); Petition of United States (The Edmund
Fanning), supra, 105 F.Supp. at 364, 369, 370.

In another Southern District of New York case,
The Argent, 1940 A.M.C. 508, 508-519 (1915), Judge Hough
ruled:

"The ground of limitation (and the only ground)
is that the damage was occasioned 'without the
privity or knowledge' of the Phoenix San & Gravel
Company.

"Let it be admitted (as I think it must be)
that an owner may be liable by reason of a negligent
or erroneous act concerning which he has neither
privity nor knowledge. It may be admitted also as
is suggested in Mr. Martin's brief, that exposition
of the meaning of the words 'privity' and 'knowledge'
has never gone beyond that given us by Putnam, D. J.
in Quinlan vs. Pew, 56 Fed. at 116 et seq. The
Court there said: 'We therefore conclude that the
word "privity" as found in this statute includes
at least as much as the word "knowledge," but we of

course do not overlook the fact that there is in law imputed knowledge, and therefore there may be imputed privity.'

"It is this imputation of knowledge or privity or both that petitioner cannot in my opinion get over in this proceeding.

"The philosophy of shipowners' limitation seems to me this: There are so many things which shipowners must do by deputy, and must have done at great distances and under circumstances where human fallibility is peculiarly prone to produce error, that they have long been saved by statute from the consequences of their agents' acts. (This view I have tried to elaborate in Julia Luckenbach, opinion filed Dec. 30, 1914, 235 Fed. 388, at pp. 393-396.)

"It would, however, be a very easy matter for an owner to shelter himself behind an actual ignorance if lack of personal knowledge always constituted a good defence to the extent of the protection accorded by statute. If lack of actual knowledge were enough, imbecility, real or assumed, on the part of owners, would be at a premium. Such assumption of ignorance would be peculiarly easy on the part of corporate owners. Corporate

owners have of late years greatly multiplied, and it is accordingly found that the doctrine of imputed knowledge and imputed privity has grown to meet the demands of business.

"In this case I think it conclusively proven that no officer of the petitioning corporation knew that the Argent maintained an unlawful light; but for the matter of that, they did not know whether she maintained a light at all; they did not regard it as any part of their business to ascertain whether that humble vessel was complying with the law or violating it every day.

* * * * *

"As long ago as Republic, 61 Fed. 109 (2d Cir. 1894), knowledge of what owners could have seen if they had looked was imputed to them. The same doctrine is assumed in Tommy, 142 Fed. 1034 (SDNY 1905); it is assumed in Re Smith, 193 Fed. 395 (2d Cir. 1911), and fully applied under circumstances which in substance are very like this in Re Sandford

Ross, 204 Fed. 248 (2d Cir. 1913).^{11/}

"Parsons vs. Empire Transportation Co.,

111 Fed. 202 (9th Cir. 1901), certiorari denied 183 U.S. 699, is authority for considering Conway as the managing agent or alter ego of the corporation. Personally I prefer the doctrine of imputed knowledge, but the result is the same."

The shipowner cannot sustain its burden of proof under the Limitation of Liability Act by proving that it picked a competent person to whom to give a managerial function. Negligence of the employee to whom the delegation had been made would still be that of the shipowner. Spencer Kellogg & Sons v. Hicks (The Linseed King), supra, 285 U.S. at 511, 76 L.Ed. at 912; Austerberry v. United States (The C.G.R. 180), supra, 169 F.2d at 594; States SS Co. v. United States (The Pennsylvania), supra, 259 F.2d at 472; The City of Brunswick, 6 F.Supp. 597, 602 (D. Mass. 1934); In re Jacobson (The Edward), supra, 52 F.2d at 180;

^{11/} "Knowledge" as used in the Limitation of Liability Act means "not only personal cognizance but also the means of knowledge of which a party must avail himself in order to prevent a condition likely to produce or contribute to a loss." Greater New Orleans Expressway Commission v. Tug Claribel, supra ftn.10, 222 F.Supp. at 524, 1964 A.M.C. at 972. See also The Cleveco, supra, 154 F.2d at 613.

Petition of the United States (The Edmund Fanning), supra, 105 F.Supp. at 369. The Limitation of Liability Act does not even require actual knowledge of the employee to whom the delegation of managerial responsibility was made. Limitation must be denied if the person exercising the managerial function could by the exercise of ordinary care have discovered the fault. Austerberry v. United States (The C.G.R. 180), supra, 169 F.2d at 594.

"The statute does not require that knowledge be actual; it may be imputed if someone in charge for the owner had general authority to act for him and by the exercise of ordinary care could have discovered the fault." In re Great Lakes Transit Corp. (The Glenbogie), supra, 81 F.2d at 444.

See also In re New York Dock Co., supra, 61 F.2d at 779.

Where the master himself is delegated the managerial duty of maintaining the vessel in safe condition, then his knowledge is that of the corporate owner, i.e., is imputed to that owner. Austerberry v. United States (The C.G.R. 180), supra, 169 F.2d at 594; Hockley v. Eastern Transportation Co., 10 F.Supp. 908, 913, 1935 A.M.C. 155

(D. Md. 1935).^{12/}

Just as he must under COGSA or the Harter Act, the shipowner under the Limitation of Liability Act has the burden of showing who had been delegated the duty of keeping the vessel in safe condition and that this person had actually carried out that duty according to the practices of the reasonably competent shipowner. States SS Co. v.

12/ See Sperry Flour Co. v. Coastwise SS Co. (The James Griffiths), 84 F.2d 785, 1936 A.M.C. 1196 (9th Cir. 1936), p. 786 of which is cited, with other cases, by Judge Denman in The Silver Palm, supra, 94 F.2d at 780, for the proposition that, in a limitation proceeding, the shipowner may not escape liability by giving managerial functions to an employed person acting as its agent, for, so far as privity and knowledge are concerned, such an agent is its alter ego. The James Griffiths, also written by Judge Denman, at that page states that "the duty of the owner, here performed through the Master, to exercise due diligence in making the vessel seaworthy as to her personnel, particularly, as here, her Chief Mate, is one of the owner's highest obligations." From what we read in the case, The James Griffiths was decided under the Harter Act and exoneration granted, so that the limitation issue was not reached, but Judge Denman still considered the ruling pertinent to limitation.

United States (The Pennsylvania), supra, 259 F.2d at 468. And the care required of the shipowner does not terminate when the ship leaves her home port. The performance of the duty to make her seaworthy before departure for sea exists at way ports as well as at the home port. Any other interpretation of the Limitation Act would be reading into it a condition which is not expressed or even implied by its terms. See Petition of United States (The Edmund Fanning), supra fn. 6, where the voyage (to the Far East) originated at Bremen but the negligence making the ship unseaworthy to the owner's privity and knowledge occurred at her next port of call, Antwerp. The ship subsequently was destroyed at Genoa. See also Deslions v. Cia. Gen. Transatlantique (The LaBourgogne), 210 U.S. 95, 133-136, 52 L.Ed. 973, 990-991 (1908) and The Black Eagle, 87 F.2d 891, 894 (2d Cir. 1937), which hold, for purposes of determining under 46 U.S.C. 183(a) and 184 (which are in "pari materia", according to The LaBourgogne) what shall constitute the "freight then pending" for the voyage during which the casualty occurred, that the return trip is an entirely new voyage. The ship, therefore, can within the contemplation of the Limitation Act begin a new voyage from ports other than her home port. Nevertheless, as we show subsequently, the duty of the shipowner to make the vessel seaworthy for purposes of the Limitation Act exists wherever the owner can exercise control.

This would certainly include such well-developed way ports as Yokohama (where the CHICKASAW was December 21-22, 1961, and January 25-26, 1962), Pusan, Korea (December 30-January 7), and Hong Kong (January 9-12). (FF 2[b])

C. Failure to Exercise Due Diligence Causing Denial of Exoneration can also Constitute Negligence Within the Privity or Knowledge of the Shipowner, thus Causing Denial of Limitation.

The inescapable conclusion from the authorities referred to above is that limitation may be denied where there has been a failure to exercise due diligence causing denial of exoneration under COGSA and the Harter Act.^{13/} It is therefore immaterial whether we say that the duty of the owner to make the vessel seaworthy is nondelegable or whether we say instead that the privity or knowledge of the employee to whom the whole or a part of that managerial duty has been delegated is imputable to the shipowner. This Circuit has stated as much (quoting approvingly from Gilmore & Black, The Law of Admiralty [1957], p. 696) as an alternative ground for its holding in States SS Co. v. United States (The Pennsylvania), supra, 259 F.2d at 474:

^{13/} Even as far back as 1906, the Ninth Circuit in a limitation case made reference to "the analogous provisions of the Harter Act." McGill v. Michigan SS Co., 144 Fed. 788, 796.

"Although the Limitation Act uses a vocabulary different from that of Harter and COGSA, the concept of liability is the same: the shipowner is not chargeable with 'privity or knowledge' or with 'design or neglect' when he has used 'due diligence' to furnish a seaworthy ship; he is so chargeable when he has failed in his duty of 'due diligence' and has sent out a ship unseaworthy in some respect that proximately contributes to the loss."

In Doughty v. Nebel Towing Co., 270 F.Supp. 957, 959 (ED La. 1967), the Court stated (quoting in the main from Gilmore & Black, supra, p. 701):

"Some duties appear to be 'nondelegable,' which is a way of saying that the corporation will be conclusively presumed to have 'privity or knowledge' of the breach, or, more directly, that the corporation will not be entitled to limit its liability in such a case no matter what the state of proof on actual privity or knowledge.' These nondelegable duties are 'all facets of * * * the shipowner's duty to provide a seaworthy ship or at least to use due diligence to send out a seaworthy ship,

one that is 'tight, staunch, strong, and well and sufficiently tackled,' and if, as a result, the ship sinks, there is obviously a breach of the duty to provide a seaworthy ship, and the owner will be denied limitation."

Gilmore & Black in this regard, though with the addition of the following important language:

"The corporate owner, unlike the individual owner, will not be allowed to escape liability for breach of his basic duty by delegating either to a master or to subordinate shore officials."

are also quoted by the 9th Circuit in States SS Co. v. United States (The Pennsylvania), supra, 259 F.2d at 472, (ftn. 2) in support (along with the citation of Spencer Kellogg & Sons v. Hicks [The Linseed King], supra) of the following proposition in the case:

"There is respectable authority which would warrant the holding that where the circumstances are such that the owners or managing agents have a duty to act to see that the vessel is made seaworthy, a neglect or failure to take such action will require denial of limitation. Mere instructions to subordinate employees will not suffice to give the owner the benefit of the limitation act."

259 F.2d at 472.

In In re Jacobson (The Edward), supra, 52 F.2d at 180, a case under 46 U.S.C. 183 before the 1936 Sirovich Amendment to that section (adding, among others subparagraph [e]), the Court stated:

"In the Grueby Case it is said on page 12:

'The duty of shipowners to their seamen to see that their ship is seaworthy and her equipment in safe condition for use when she starts on a voyage is a personal one, responsibility for which they cannot escape by delegating its performance to another. In this respect it is like the common-law duty of a master to provide his servant a suitable place in which to work. And a seaman injured through failure to perform this duty is entitled to compensation.'

"With this statement of the law I fully agree. It is my opinion that those decisions are illogical which hold that, where an owner delegates the job of furnishing a seaworthy vessel to another, he may have limitation, but that, where he tries to make it seaworthy himself, he may not have." (Emphasis added.)^{14/}

^{14/} Appellant's reliance on Earle & Stoddardt v. Ellerman's Wilson Line, 287 U.S. 420, 77 L.Ed. 403 (1932), a

14/ cont'd.

case involving negligence of the chief engineer in bunkering (a typical concern of the ship's personnel) and wherein the Supreme Court denied application to the Fire Act (46 U.S.C. 182) of the Harter Act principle of non-delegability, is misplaced.

The Fire Act and the fire exception in COGSA (46 U.S.C. 1304[2][b]), enacted in 1936, have the same legislative purpose which has carried over into their judicial interpretation: enabling "the carrier to compete (with England) by offering a carriage rate that paid for carriage only, without loading it for fire liability." A/S Ludwig Mowinckels Rederiv. Accinanto, Ltd. (The Ocean Liberty), 199 F.2d 134, 144, 1952 A.M.C. 1681 (4th Cir. 1952), cert. den. 345 U.S. 992, 97 L.Ed. 1400 (1952), quoting from Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo (The Venice Maru), 320 U.S. 249, 254-256, 88 L.Ed. 30, 34-35 (1943). This purpose--freeing the owner from bearing the risk of cargo loss and damage due to fire--is not at all involved in 46 U.S.C. 183 with which we are concerned in this appeal. Further, more recent cases, such as The Edmund Fanning, supra, show quite a different approach than that of the Supreme Court in 1932 in Earle & Stoddardt. (Note also the concession by cargo in the latter case "that the negligence of the master, chief engineer or other ship's

D. Privity and Knowledge under the Limitation of Liability Act are Imputable where there are Means Available through which the Shipowner can Exercise Control and it Fails to do so.

Gilmore & Black (and this Court also quotes from these authors in this regard in States SS Co. v. United States [The Pennsylvania], 259 F.2d at 474) are of the opinion that the shipowner's denial of exoneration under COGSA or the Harter Act and of limitation under the Limitation of Liability Act should equally depend on the presence or absence of means of control by the shipowner. The appropriate language of Gilmore & Black referred to (p. 696) is as follows:

"The principle of the Limitation Act is the same as that found in the Harter Act and the Carriage of Goods by Sea Act: because of the extraordinary hazards of seaborne commerce and because the owner can exercise only a nominal control over his 'servants' once the ship has broken ground for the voyage, the owner should be

14/ cont'd.

officers does not deprive the owner of the statutory immunity [in the Fire Act]. 287 U.S. at 424-425, 77 L.Ed. at 406.)

entitled to exoneration from liability, or at least to a limitation of liability, for whatever happens after the ship has passed beyond his effective control. Contrariwise, he should be held to liability for all loss resulting from his failure to exercise effective control when he had the chance." (Emphasis is in this Court's per curiam opinion in The Pennsylvania, 259 F.2d at 474.^{15/}

This Circuit, after The Pennsylvania, actually held that an owner was privy to a master's negligence (in hiring an incompetent crewmember) on the basis that there were means of exercising control at hand by which the fault could have been prevented. Admiral Towing Co. v. Woolen (The Companion), 290 F.2d 641, 648-649 (9th Cir. 1961). And this was a considerably more difficult case for denial of limitation than ours since the shipowner

^{15/} See also the decision of Judge Learned Hand in Great Atlantic & Pacific Tea Co. v. Brasileiro, supra, 159 F.2d at 664: "As in all such cases, the measure of the duty imposed depends upon the cost or difficulty of the precaution, compared with the hazard and the interest at stake."

was an individual rather than a corporation.^{16/}

Besides the specific approval of this Circuit, there is other substantial case authority supporting Gilmore & Black's conclusion:

Hockley v. Eastern Transp. Co., supra, 10 F.Supp. at 917-918:

"As has been pointed out, the main purpose of the limited liability statute is to protect the vessel owner from the faults and contracts of the agents when not under the principal's control. It cannot fairly be said that the loading of this barge under all the circumstances was so far removed from the vessel owner's control and supervision as to warrant the latter's complete divorce from any responsibility

^{16/} At fn. 6, 290 F.2d at 649, this Court, through Judge

Stephens, adverted to the fact that ownership was in an individual when it discussed nondelegability of the duty to provide a seaworthy vessel. It was stated that to hold the duty nondelegable in the case of an individual owner would result in limitation seldom being granted. "We here mean neither to reaffirm nor to disparage the principle of nondelegability insofar as corporate owners are concerned, but we choose not to apply it in the present situation."

with regard to the amount of its load. The failure to exercise any supervision under the circumstances constituted more than mere casual neglect in a particular instance, and would appear from the respondent's testimony to have been in accordance with a general settled policy to leave the loading even in the home port entirely to the judgment of the barge captain, uninstructed by the owners. In my opinion something more is required of vessel owners under such circumstances to entitle them to avail themselves of the limited liability statute."

From the Supreme Court:

Spencer Kellogg & Sons v. Hicks (The Linseed King),
supra, 285 U.S. at 511, 76 L.Ed. at 912:

"The argument is that as the boat was seaworthy when there was no ice and instructions had been given to a competent master not to run her through ice, the owner did its full duty and cannot be held responsible as having privity or knowledge of a violation by the master of these explicit instructions. Cases such as La Bourgogne (Deslions v. La Compagnie Generale Transatlantique) 210 U.S. 95, 52 L.Ed. 973,

28 S.Ct. 664, which involved the master's failure to obey rules and instructions when on the high seas and disaster attributable to such fault, are cited. But there is a vast difference between the cases relied on and instant one. The launch was used for ferriage over a distance of about a mile and a third. She was known to be unseaworthy and unfit if there was ice in the river. There is no analogy between such a situation and that presented in the cited cases where the emergency must be met by the master alone. In these there is no opportunity of consultation or cooperation or of bringing the proposed action of the master to the owner's knowledge. The latter must rely upon the master's obeying rules and using reasonable judgment. The condition on the morning in question could have been ascertained by Stover, if he had used reasonable diligence, and we think the evidence is adequate to support the finding that the negligence which caused the disaster was with his, and therefore with the owner's, privity or knowledge."^{17/}

^{17/} See also Cullen Fuel Co. v. Hedger, 290 U.S. 82, 88-89,

This Court, in The Pennsylvania, 259 F.2d at 474, used the above quoted language from The Linseed King in support of the preceding quote (in this brief) from Gilmore & Black, p. 696. See also In re Jacobson (The Edward), supra, 52 F.2d at 181.

The telephone and the mail, which were sufficient

17/ cont'd.

78 L.Ed. 189, 192 (1933):

"The petitioner urges that the denial of limitation in cases like this will sweep away much of the protection afforded to ship owners by the acts of Congress. But this view disregards the nature of the warranty (of seaworthiness). The fitness of the ship at the moment of breaking ground is the matter warranted, and not her suitability under conditions thereafter arising which are beyond the owner's control."

The Ninth Circuit in the individual ownership case of Admiral Towing Co. v. Woolen (The Companion), supra, 290 F.2d at 648, drew a distinction between "instantaneous negligence on the part of the master at sea, (i.e.) negligent behavior over which the shipowner could not possibly exercise control," and "unlimited agency powers (in the master) to take care of all other aspects of keeping and running the vessel."

means of control in Hockley to cause denial of limitation for what the master did, were just as available to Waterman here, since the CHICKASAW spent over a month in Japanese and adjacent ports, beginning and ending her sojourn there in Yokohama.^{18/} Further, Waterman could have exerted control through a shoreside representative such as Everett Steamship Company, itself a vessel owner as well as ship's agent acting in various ports of the world (including Yokohama) where offices are maintained. Inspection of the vessel--and especially her navigational equipment--could have been accomplished by Everett or a Waterman shoreside employee. Neither was done and instead the master

^{18/} See Gilmore & Black, supra, p. 708:

"... modern communications by telegraph, cable and radio, make the idea, which was often true in fact a hundred years ago, of credit extended 'to the ship' in foreign ports, without the owner's authorization, fictional indeed. Although the point has never been authoritatively determined in a modern case, it is probable that all repair and supply contracts are 'personal,' home port or foreign port, lien or no lien."

See also Avera v. Florida Towing Corp., 322 F.2d 155, 165 (5th Cir. 1963).

was given full authority in way ports to make the vessel seaworthy and to arrange, if he cared to, for repairs of such necessary and vital equipment as the fathometer and radar. Thus, instead of keeping control in some manner, Waterman delegated this vital part of its management function to the ship's master. His failure to perform it caused privity and knowledge to be imputed to Waterman. True, it also caused denial of exoneration under COGSA but nowhere did the Court below say that because exoneration is denied limitation is also denied. While we submit that the Trial Court could have held that way under the existing authorities, it did not rest on such an assumption but went forward to make the well-substantiated (as we will show) findings of direct fault and privity/knowledge.

E. There is Nothing Inherent in the Position of Master which Permits a Shipowner to Insulate Itself under the Limitation of Liability Act by Delegating Managerial Responsibility to the Master.

Why does Appellant assume that, as a matter of law, the shipowner cannot delegate managerial functions to a master?^{19/} (See, for example, Opening Brief p. 22.)

^{19/} We are unable to follow Appellant's argument that the 1936 Sirovich Amendment to 46 U.S.C. 183, adding

There is nothing about the master's position that limits his duties to navigation and management while at sea. On the contrary, in fact, for he has a great deal of authority to bind the shipowner even without a delegation such as was made in our particular case. His contracts can, for example, create a lien on the vessel and bind the owner. Further, the master's statements constitute admissions of the owner. The Joseph J. Hock, 70 F.2d 259, 260, 1934 A.M.C. 507 (2d Cir. 1934); Abangarez-Submarine 05,

19/ cont'd.

subsection (e):

"In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel."

shows that, where loss of life or personal injury is not involved, the law is otherwise concerning privity or knowledge. Were this so, limitation would be granted not only where the master was involved but also where the privity or knowledge is that of the superintendent or managing agent. This is not the law. Further, the action of Congress in adding such a subsection and not touching 183(a) could not be construed to have meant to affect the latter.

60 F.2d 543, 544, 1932 A.M.C. 1247 (ED La. 1932); 1 Benedict on Admiralty (6th ed.), pp. 20, 152-153. The master of a vessel is, for discovery purposes, considered to be a "managing agent" of the shipowner under Fed. R. Civ. P. 26(d)(2). Curry v. States Marine Corp., 16 F.R.D. 376 (SDNY 1954); Shenker v. United States, 25 F.R.D. 96 (SDNY 1960); Wilson v. Trinidad Corp., 11 F.R.D. 191 (SDNY 1951).

The Shenker case defined "managing agent" as follows:

"Without setting forth all the applicable guides it might be stated in short that a person who is vested with general supervisory authority with full power to exercise judgment and discretion in managing and dealing with the principal's interest in the subject matter of the litigation and is loyal to the principal, is a managing agent. Accordingly, it has been held that a captain or chief officer of a vessel satisfies these criteria and is a managing agent whose deposition may be taken within the meaning of the rules." 25 F.R.D. at 98, 99.

See also United States v. The Dorothy McAllister, 24 F.R.D. 316, 318 (SDNY 1959). Such language can properly be related to the Limitation of Liability Act.

Even without imputing privity or knowledge

because of the delegation of managerial responsibility, a master's or crewmember's negligence--even at sea--can be the basis for a finding of direct fault of the owner and result in denial of limitation, providing that the master's or crewmember's negligence was foreseeable to the owner. As stated by the First Circuit in Christopher v. Grueby, supra, 40 F.2d at 13:

"If the engineer was careless in pouring gasoline when the engine or engines were running, nevertheless the owners could reasonably have foreseen that he might do so, and their negligence in suffering this fire hazard to exist in the engine room could be found to be the proximate cause of the disaster, and we think it was.

(Citations.) No rules were provided or instructions given to the engineer not to fill the reservoir when the engines were running. Furthermore, as the owners were negligent in failing to provide reasonable means to cope with a fire in the engine room, where one reasonably could be expected to occur, their failure in this respect was plainly a cause of the loss and damage here complained of and for which they are responsible."

F. Limitation of Liability Can Be Denied Due to the Direct Fault of the Shipowner without Consideration of

Privity or Knowledge.

In Mobile, the CHICKASAW's home port, the company maintained a Port Captain and Port Engineer, personnel who are actually 'managing officers of the corporation." States SS Co. v. United States (The Pennsylvania), supra, 259 F.2d at 464. Their failure to inspect the ship and her navigational equipment while she was in Mobile is shown by the long-standing neglect of the CHICKASAW's fathometer and radar. (See further sections II A and B, infra.) These defects are such that "we are forced to the inevitable conclusion that what the company did through these officials was insufficient." In re Eastern Transp. Co., supra, 37 F.2d at 364. This is "such neglect on the part of the managing officials of the company as to preclude the company from availing itself of the defense of limitation of liability, on the ground of lack of privity or knowledge." Id., 37 F.2d at 365.

As the Court of Appeals stated in The Lady Gwendolen, supra, referring to the decision of the trial judge in denying limitation:

"With the obvious sources of fault lying with the master and the marine superintendent, why has the judgment found actual fault on the owners or at least a failure on their part to

establish no fault?

"It is on account of the introduction of radar and the learned Judge's view of the owner's obligation with regard to supervision of its use. Reliance on a competent master and an efficient marine superintendent has been held by him not to be enough to exonerate the owners." [1965] 1 Lloyd's List L.R. at 338.

"... as the judge finds, no steps were taken by them (the shipowners) to insure that their masters used their radar in a proper manner and he adds that the radar problem was one of such serious import as to merit and require the personal attention of the owners." [1965] 1 Lloyd's List L.R. at 339.

Appellant has failed to attack the finding of its direct fault, or even to refer to it. Appellant cannot therefore go behind that finding.

II

The Findings of Fact and the Evidence Establish All Necessary Elements for a Decision Denying Exoneration from and Limitation of Liability.

Although, as we have pointed out, Appellant has failed to attack as clearly erroneous any of the lower Court's findings of fact, and indeed has carefully avoided any reference to the facts of this case, the very nature of a limitation action requires that the pertinent facts be considered. Whether or not limitation will be allowed cannot be decided as an abstract question of law since privity and knowledge, which Appellant disaffirms, turn "on the facts of particular cases." Coryell v. Phipps (The Seminole), 317 U.S. 406, 411, 87 L.Ed. 363, 368 (1943).

A. The Evidence Supports the Finding of Unseaworthiness and Causality by Reason of the Condition of the Fathometer.

Appellant does not dispute that the CHICKASAW was unseaworthy prior to her stranding in that her fathometer was not in a reliable working condition. (FF 4.) As the evidence more fully shows, however, the fathometer was defective in at least three respects:

(1) The voltage on the "bias control" was abnormally low due to the fact that two resistors in the bias control mechanism had changed value over a period of time. (T. 687, 706-709.) The bias control on a fathometer determines the

strength of a signal which will be conducted by a fathometer tube and, therefore, shown on its indicator. An abnormally low bias control voltage, as was present on the CHICKASAW fathometer, permits smaller signals to be amplified with the result that stray or false signals may be shown around the fathometer indicator. (T. 707, 708.)

(2) The grid caps on two tubes inside the receiver-amplifier of the fathometer were loose to the extent that they were not making contact at all times. This malfunction also causes the fathometer indicator to pick up stray or false echoes as the grid caps intermittently make contact due to the vibration of the ship. (T. 688, 690, 704.)

(3) A pin was apparently sheared in the gear train which causes a dial on the fathometer indicator to register either feet or fathoms. The effect of a sheared pin is to cause slippage in the gears, resulting in an inaccurate presentation of distance on the indicator dial. (T. 688-690.)

It is interesting to note that either of the first two defects mentioned above, the improper bias control voltage or the loose grid caps, can cause precisely the type of malfunction which was reported by Third Officer Jensen, that is, lights or signals all around the fathometer dial rather than on a particular fathom mark. (T. 670, 1410.)

Both fathometer experts, Mr. Harrison and Mr. Haldane, confirmed that the defects in the CHICKASAW's fathometer were sufficient to make it at least unreliable. Both experts also agreed that the fathometer was in dire need of servicing. Mr. Haldane, the Appellant's own expert, stated in his original report:

"There is no way of determining whether or not this equipment would have worked correctly at any particular time in the past. There was ample evidence that its operation could be highly erratic and unstable for both mechanical and electronic reasons. There was also ample evidence that would lead one to conclude that it had not been serviced for a long time. It was definitely in need of service at the time of this inspection for both mechanical and electronic reasons." (T. 1345.)

Mr. Harrison pointed out that the receiver-amplifier cover of the fathometer was coated with at least three layers of paint which had to be chipped away before it could be inspected. (T. 686, 687.) He further testified that fathometers should be inspected at least annually and that if such inspection had been carried out the defects in the CHICKASAW's fathometer would surely have been discovered. (T. 693.) Moreover, his uncontradicted testimony is that the defects in the CHICKASAW's fathometer had existed for

a considerable period. The grid caps, for instance, would not, in his opinion, have been loosened by vibration in less than a year's time. (T. 705, 706.)

The Appellant likewise does not dispute the Court's finding that:

"The condition of the fathometer contributed to the stranding. Immediately preceding the stranding of the SS CHICKASAW, Jensen, the third mate, who had previously discovered the fathometer to be inoperative, was mate on watch. As the vessel approached Santa Rosa Island, Jensen was looking through the rain for white water, an indication of breaking waves and the shoreline. If the fathometer had been operative, Jensen would have turned it on during this approach, which would have revealed shallow water in time to avert the stranding. The reason it was not turned on was that, in his judgment, it was inoperative. (FF 4.)

Appellant instead attempts to show lack of causation by arguing that Jensen's deposition should be excluded because he died before there was an opportunity for cross examination. It is believed that Appellant is clearly in error and that the lower Court correctly admitted the deposition. Inasmuch as the authorities concerning this point are fully reviewed in the brief of Appellee Gay Cottons,

Inc., they will not be repeated here. It is pointed out, however, that Jensen's testimony before the Coast Guard additionally supports the Court's finding that the fathometer was not used because of its inoperative condition. (T. 1405-1423.) Moreover, at the Coast Guard hearing Jensen had even more reason than at his deposition to demonstrate that he was not negligent and that he conducted all of his duties in a proper manner. The admission of such testimony, given under oath with full opportunity for cross examination, is in the interests of justice and is fully supported by the authorities. United States v. The J. A. Cobb, 182 F.Supp. 234 (SDNY 1959); Sword Line v. Tug Joseph H. Moran, 57 F.Supp. 183, 1944 A.M.C. 1375 (EDNY 1944).^{20/} The admissibility of Coast Guard testimony when a witness dies before trial is also in accordance with the general rule allowing the use of testimony taken in a former proceeding involving the same parties and subject matter when the witness is deceased or otherwise unavailable. Great Northern Ry. Co. v. Ennis,

20/ The Appellant apparently agrees inasmuch as no objection was made during trial to the admission into evidence of the Coast Guard transcript of Jensen's testimony.

236 Fed. 17, 26 (9th Cir. 1916); Smythe v. Inhabitants of New Providence, 263 Fed. 481, 487 (3d Cir. 1920); Insul-Wool Insulation Corp. v. Home Insulation Corp., 176 F.2d 502, 504 (10th Cir. 1949); Rivera v. Am. Export & Hellenic Lines, 13 F.R.D. 27, 1952 A.M.C. 772, 775 (SDNY 1952).

Even in the absence of any testimony from Jensen, however, the record fully supports the Court's finding that the defective fathometer contributed to the stranding of the CHICKASAW. Captain Patronis, the Master of the CHICKASAW, testified that he received Jensen's report that the fathometer was not working and that he directed Jensen to make a log entry to this effect, which was done. (T. 134, 135.) Captain Patronis stated that it was his customary practice to use the fathometer to determine the position of his vessel (T. 143) and he agreed that the fathometer should have been used in making a landfall. (T. 152.) All expert witnesses also agreed that the fathometer should have been, and under normal circumstances would have been, used by the CHICKASAW prior to her grounding. (Captain Slack T. 518, 519; Captain Solnordal T. 1009; Captain Vincent T. 1024; Captain DeSanty T. 802, 853.) And there can be no doubt that even a casual use of the fathometer would have prevented the stranding. The fathometer on board the CHICKASAW had a range of 200 fathoms, that is, it would indicate the depth

of water whenever such depth was 200 fathoms or less. The record shows that the CHICKASAW came into water of 200 fathoms or less approximately 15 miles seaward of Santa Rosa Island. At the speed the CHICKASAW was traveling, approximately 16 knots, had the fathometer been used it would have given her nearly an hour's warning that she was in shallow water and not on her assumed track line. This is so because if the CHICKASAW had been where she thought she was, the 200 fathom curve would not have been reached until after the time she actually grounded. (T. 140-142.)

Finally, and most importantly, Appellant's argument that Jensen's testimony constitutes the sole basis for finding that the inoperative fathometer contributed to the stranding overlooks the fact that the absence of an efficient fathometer and mechanical deep sea sounding machine (as required by 46 C.F.R. § 96.27-1) constitutes a statutory violation. As detailed in section IIC, infra, such violation is presumed under the Pennsylvania Rule to have been a contributing cause of the stranding and Appellant has the burden of showing that the defective fathometer could not have so contributed. Since Appellant has not contested on appeal the finding that the CHICKASAW had no reliable fathometer or other sounding device (thus in effect admitting a statutory violation), it is submitted that no evidence by Appellees is required to sustain the

related finding that the condition of the fathometer contributed to the stranding.

B. The Evidence also Requires a Finding of Unseaworthiness and Causality by Reason of the Condition of Other Navigational Instruments.

The opinion and findings of the Trial Court base the unseaworthiness of the CHICKASAW solely upon the inoperative condition of her fathometer. However, the fathometer was only one of several navigational instruments on the CHICKASAW which were either malfunctioning or completely inoperative due to the neglect of Waterman. The most important of these instruments for our purposes are the deep sea sounding machine, the radar and the radio direction finder, any one of which, in good operating condition, would have prevented the stranding. It is submitted that the evidence with respect to these instruments provides an additional basis for denial of exoneration and limitation.

1. The Deep Sea Sounding Machine.

At the time of her Coast Guard inspection in October 1961, the CHICKASAW had on board a mechanical deep sea sounding machine which was reported to be in good operating condition. (T. 1306, 1307.) Even in the absence of an operable fathometer, such a deep sea sounding machine would have satisfied the requirements of 46 C.F.R. 96.27-1

and, more importantly, would have enabled the CHICKASAW to detect shallow water on her approach to Santa Rosa Island. While in the Far East, however, the chief mate decided that the sounding machine, still apparently in good operating condition, was of no value, even though the fathometer had previously been reported to be out of order. He therefore ordered the boatswain to dismantle the machine and dispose of it. "I told him to get rid of it, he could have it." The boatswain thereupon sold the sounding machine for scrap in Kobe, Japan. (T. 743-749; FF 9.) The chief mate did not obtain the permission of Waterman Steamship Company to dispose of the sounding machine and further stated that in the way Waterman operated their ships, it was unnecessary for him to ask their permission. (T. 749.) This was never contradicted by any Waterman official.

2. The Radar.

As was found by the lower court (FF 7), the CHICKASAW's radar was totally inoperative at all times after the CHICKASAW arrived at Japan. The inoperative condition of the radar was actually reported to Captain Patronis by the second mate five or six days prior to arriving in Yokohama on December 21, 1961. (T. 216, 217.) In Yokohama, the radar was examined by a representative of the Nippon Radar Service Company, Mr. Iriya. (T. 1099.) It was found that some of the teeth on the pinion gear,

which rotates the radar antenna, were broken. (T. 1103.) The Nippon Radar Service Company did not have this pinion gear in stock and, as a result, no further attempt was made by the Master of the CHICKASAW to have the radar repaired while the vessel was in the Far East and prior to her departing Yokohama on January 26, 1962. (T. 220-224.)

As was found by the lower Court, "It was possible either to have a new gear cut in Japan or have one flown from the United States." (T. 1107, FF 7.) More specifically, the testimony shows that Nippon Radar Service previously had such a pinion gear manufactured in Japan and that, upon normal order, such manufacture took ten days. (T. 1060-1062.) The service manager of Nippon Radar Service Company also agreed that, upon a customer's request, parts could be ordered from the United States. (T. 1063.) Nevertheless, during the more than 30 days while the CHICKASAW was in the Far East, the Master made no attempt to obtain a new pinion gear by either of these methods.

A more thorough examination of the CHICKASAW's radar after the stranding by Mr. Harrison of Neptune Electronics disclosed the cause of the broken gear. Mr. Harrison found that all of the bolts holding the radar antenna to its housing were loose and that one of the bolts was missing. The missing bolt, Mr. Harrison concluded, had loosened and dropped down into the teeth of the gear, causing the damage

which rendered the radar inoperable. (T. 694.) Mr. Harrison explained that such hold-down bolts have a tendency to work loose as a result of normal ship vibration but that this condition could readily have been discovered in a routine periodic inspection. (T. 695-696.)

Although the lower court found that the CHICKASAW's radar was unusable, it determined that this defect was not a contributing cause of the grounding because "the crew all knew that the radar was unusable and were placing no reliance upon it." (FF 8.) It is submitted that this very fact, the inability of the crew to rely upon the inoperative radar, conclusively shows that the defect did contribute to the stranding. Indeed, the very same reasoning used by the Court with respect to the fathometer is applicable to the radar: "If the fathometer had been operative, Jensen would have turned it on during this approach, which would have revealed shallow water in time to avert the stranding. The reason it was not turned on was that, in his judgment, it was inoperative." (FF 4.) If the radar had been turned on, it would have revealed the presence of, and the distance to, Santa Rosa Island itself. There can be no question but that the radar, as compared with other aids to navigation, would have provided the most effective warning of the impending danger.

There is also no doubt that the radar would have been used had it been operative. Although Captain

Patronis was himself inexperienced in the use of radar, Chief Mate Filippone testified that the CHICKASAW customarily used the radar for the purpose of making a landfall in poor visibility. In his own words, "That's the best thing to use." (T. 394.) Indeed, the crew of the CHICKASAW had come to rely upon the radar to such an extent that when the vessel's position could be determined by radar, other navigational instruments, such as the radio direction finder, would not be used for that purpose. (T. 359, 817.)

It is therefore submitted that the evidence conclusively shows that the CHICKASAW's radar was defective and that, contrary to the finding of the lower Court, such defective condition contributed to the stranding. Much has been made by Appellant of the fact that radar (unlike the fathometer and radio direction finder) is not required by statute or regulation. But there is, of course, no requirement that a statute be violated in order to preclude either exoneration under the Carriage of Goods by Sea Act or Limitation of Liability under 46 U.S.C. 183^{21/} (although as discussed in section II C, infra, the violation of a statute may place a far heavier burden upon the vessel owner under

^{21/} See, for example, Greater New Orleans Expressway Com'n v. Tug Claribel, discussed at Section II C 3, infra.

the Pennsylvania Rule). The effect of the absence of radar on the CHICKASAW must necessarily be considered in light of all relevant circumstances, including the customary reliance of her personnel upon the radar and the complete absence of any other effective navigational equipment on board.

3. The Radio Direction Finder. 47 U.S.C. 351, a portion of the Federal Communication Act of 1934, requires that vessels of the CHICKASAW's gross tonnage be "equipped with an efficient radio direction finding apparatus (radio compass) properly adjusted in operating condition ..." It was further required by 47 C.F.R. 8.517b that the calibration of such radio direction finder shall be checked at yearly intervals or as near thereto as possible and that a record of such check shall be maintained on board for at least a year.^{22/} The CHICKASAW had on board a radio direction finder (hereinafter referred to as "RDF"). However, as was found by the Court (FF 8), there is no evidence that the required accuracy check of the RDF had been conducted on board the CHICKASAW subsequent to 1957, five years prior to the stranding.

The evidence shows that the proper way to calibrate an RDF is to "swing the ship," that is, to compare bearings obtained by the radio direction finder with visual

^{22/} This requirement is now set forth in 47 C.F.R.

83.459b.



bearings in all four quadrants of the compass. Chief Mate Filippone testified that such a check of the RDF had never been carried out after his arrival on the CHICKASAW in April, 1958. Only once, in October, 1958, did he recall any comparison being made between RDF and visual bearings. (T. 340-342.)

Not only was there no more recent correction table posted than the one dated 1957, but even this table was of no practical value to the vessel or her personnel. Captain Patronis testified that he had no idea what use should be made of this table inasmuch as he did not know whether or not the errors listed on the table had already been compensated for in the permanent calibration of the RDF. (T. 242-245.) Chief Mate Filippone also stated that he had never been told anything about this table. (T. 348-350.) Such is not surprising in view of the testimony of Captain Murdock, Waterman Steamship Corporation's Port Captain, that Waterman maintains no program for insuring that a proper correction table is kept on board their vessels and indeed makes no inspection to insure that shipboard personnel comply with the statutes by conducting annual accuracy checks and maintaining such a table. (T. 1378.) (See further section II E 2, infra, dealing with Waterman's failure to inspect.)

As found by the lower court (FF 8.), the

position fixes obtained from the RDF prior to the stranding of the CHICKASAW were completely inconsistent and as a result were of no practical assistance to the CHICKASAW. The most accurate position fix obtained was at 1640 hours, which fix was nearly four miles in error. At least five additional attempts were made to obtain fixes subsequent to the stranding of the CHICKASAW at 2117 hours, but all of these fixes placed the CHICKASAW considerably to the south of her correct position. (T. 121.) The lower Court concluded, however, that the RDF fixes did not contribute to the strand, apparently because they were so far in error: "...no reasonably expected deviational error could account for the wildly divergent and inconsistent fixes which the crew obtained. If the incorrect fixes obtained from the radio direction finder contributed to the grounding, these fixes were due to the negligence by members of the crew and are not due to any failure to have an up-to-date deviation card aboard." (FF 8.) If the RDF fixes had been only slightly in error, the Court apparently would have found no difficulty in concluding that the defects in the RDF contributed to the stranding. While it is not contested that the crew may have been negligent in using the RDF, such negligence in no way supersedes the defects in the equipment. Indeed, a negligent or less competent crew has even greater need for equipment in proper working order and if negligence

and faulty equipment were concurrent causes of the error, Waterman may not be heard to rely upon the negligence to relieve them of their responsibility for proper maintenance.

Finally, it is again noted that the failure to annually check the calibration of the RDF and to have on board an up-to-date correction table constitute statutory violations. Thus, as with the fathometer, Appellant has the burden under the Pennsylvania Rule of showing that such violations could not have contributed to the stranding. (See section II C, infra.) Merely showing the negligent use of such equipment does not begin to meet this burden.

C. Appellant has Failed to Meet the Burden of the Pennsylvania Rule.

The Government contends that the CHICKASAW was in violation of two regulatory safety measures prior to and at the time of her stranding:

(1) Failure to have on board either an operative fathometer or mechanical deep sea sounding device as required by 46 C.F.R. 96.27-1.

(2) Failure to have on board an "efficient" radio direction finder "properly adjusted in operating condition," 47 U.S.C. 351, and 47 C.F.R. 8.516, as shown by her failure to carry out and maintain on board the annual accuracy checks as required by 47 C.F.R. 8.517(b).

The effect of these statutory violations is to require Appellant to meet the burden of the admiralty presumption known as the Pennsylvania Rule. Because of the importance of the presumption to this case, it will be dealt with at some length.

1. The Pennsylvania Case.

The presumption known as the Pennsylvania Rule derives its name from The Pennsylvania v. Troop, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1873). An understanding of the nature of the presumption and the reasons for its adoption necessitates a review of the facts pertinent to the Court's decision.

The case arose out of a collision in the fog between the British steamship Pennsylvania and a British bark, Mary R. Troop. Immediately before collision, the steamer was proceeding at about seven knots, although the fog was so thick that visibility was probably less than a ship's length. The bark, on the other hand, was moving very slowly, probably less than one knot, and was ringing a bell constantly. A collision occurred and the bark sank. A libel was filed by the owners of the bark and judgment was rendered in their favor by the District Court. The Circuit Court affirmed and an appeal was taken to the United States Supreme Court. The steamer was held clearly at fault, mainly for her immoderate speed in the dense fog. The main issue on

appeal, therefore, concerned the liability of the bark, for she was in violation of regulations providing that sailing vessels shall use a fog horn when under way and, when not under way, shall use a bell. The Court emphasized that although the bark was moving at a very slow speed, she was constantly changing position and therefore clearly required to blow a fog horn. The claim of the bark was that this violation "was only a technical fault, not a substantial fault, and did not in any way contribute to the collision."

A statutory fault having been established, it thus remained for the Court to determine whether or not such fault contributed to the collision and it was on this issue that the Court set forth the presumption for which the case has become famous:

"Concluding, then, as we must, that the bark was in fault, it still remains to inquire whether the fault contributed to the collision, whether in any degree it was the cause of the vessels coming into a dangerous position. It must be conceded that if it clearly appears the fault could have had nothing to do with the disaster, it may be dismissed from consideration. The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of collision is in actual

violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute." (Emphasis added.) 86 U.S. at 136.

The Court thus stated, and the case has been cited for the proposition time and time again, that a statutory violation is presumed to have been "if not the sole cause, ... at least a contributory cause of the disaster." And the Supreme Court further emphasized that the offender has the burden of proving that the violation could not have been one of the contributing causes.

2. Application of the Pennsylvania Rule - Generally.

The Pennsylvania Rule has been applied in literally thousands of cases since it was first enunciated by the Supreme Court, and the reason for its application, i.e., to enforce compliance with regulations promulgated for the safety of life at sea, is as valid today as when the rule was adopted. Just one example of a recent expression of the rule is found in Reiss Steamship Co. v. Compagnia Flepera Cajotamil, S.A., 374 F.2d 117, 123 (6th Cir. 1967):

"It is understandable that courts desire to mitigate the 'Pennsylvania' burden, and the rigors of the divided damages rule. However, this Court has strictly applied the rules of navigation, and has placed a heavy burden upon a vessel to show not merely that her faults might not have been causes, but that such faults could not have contributed to the collision.

"We believe the West violated Rule 26 when she failed to sound a danger signal, and that she failed in her burden of showing that this failure could not have contributed to her grounding."

Although The Pennsylvania was a collision case, the presumption has consistently been applied in all types of admiralty cases, including such diverse statutory violations as:

(a) violation by a bridge of regulations^{23/} pertaining to its construction or operation. The Fort Fetterman v. South Carolina State Highway Dept., 278 F.2d 921 (4th Cir. 1960); Great Lakes Towing Co. v. Mesaba S.S. Co., 237 Fed. 227 (6th Cir.

2/ It has been settled law ever since Belden v. Chase, 150 U.S. 674, 698, 37 L.Ed. 1218, 1227 (1893), that a violation of regulations promulgated pursuant to statutory authority will invoke the Pennsylvania Rule.

1916); Connors Marine Co. v. New York & Longbranch R. Co., 87 F.Supp. 132 (D.N.J. 1949); Buffalo Bridge Cases (Petition of Kinsman Transit Co.), 338 F.2d 708, 718 (2d Cir. 1964);

(b) violation of regulations by an underwater construction project, Bultema Dock and Dredge Co. v. Steamship David P. Thompson, 252 F.Supp. 881 (W.D. Mich. 1966);

(c) improper construction of an underwater pipeline in violation of the Rivers and Harbors Act, 33 U.S.C. 403, Atlantic Pipe Line Co. v. Dredge Philadelphia, 247 F.Supp. 857, 862 (E.D. Pa. 1965), affirmed 366 F.2d 780 (3d Cir. 1966);

(d) failure of a barge to give Coast Guard the required notice of material damage and to have a licensed tanker man assigned to supervise unloading of gasoline as required by Coast Guard regulations, Commercial Transport Corporation v. Martin Oil Service, Inc., 374 F.2d 813 (7th Cir. 1967).

The Pennsylvania Rule has been applied in actions arising out of the stranding of vessels ever since Richelieu and Ontario Navigation Co. v. Boston Marine Insurance Co., 136 U.S. 408, 34 L.Ed. 398 (1890). See also Flint & P.M.R. Co. v. Marine Insurance Co., 71 F.2d 210 (E.D. Mich. 1895); American Merchant Marine Insurance Co. of New York v. Liberty

Sand and Gravel Co., 282 Fed. 563 (3d Cir. 1922); and the general discussion of the application of the Pennsylvania Rule to stranding cases in The Denali, 112 F.2d 952, 955 (9th Cir. 1940).

3. Application of the Pennsylvania Rule in
Limitation of Liability Cases.

One of the most common applications of the Pennsylvania Rule is in actions seeking limitation of liability. The reason for its application in such cases was well stated in The E. Madison Hall, 140 F.2d 589 (4th Cir. 1944), cert. denied 322 U.S. 748, 88 L.Ed. 1579 (1944), wherein the vessel was not provided with the proper complement as required by statute. In holding that the District Court properly denied the petition for limitation of liability, the Circuit Court stated:

"The burden of proof, however, to establish lack of privity or knowledge rests upon the owner seeking limitation of liability. And where the owner has privity or knowledge of some violation of the statutes affecting the navigation of the ship, it is presumed under the doctrine of The Pennsylvania, 19 Wall. 125, 136, 22 L.Ed. 148, that the fault is at least a contributing cause to the loss; and the owner must bear the burden of showing not merely that his fault probably was not, but also that it could not

have been a contributing cause of the disaster. The New York Marine No. 10, 2 Cir., 109 F.2d 564, 566; The Denali, 9 Cir., 105 F.2d 413, 420. This burden has not been borne by the owner in the pending case and the decree of the District Court must therefore be affirmed." 140 F.2d at 591.

Similarly, in Martin Marine Transportation Co. v. United States, 183 F.2d 676 (4th Cir. 1950), a petition for limitation of liability was denied because of undermanning in violation of regulations. In reversing the District Court, which granted limitation as to the barges involved, the Fourth Circuit held:

"In exonerating the barges Contoy and Southern Sword, the District Judge seems to have applied the rule that this undermanning of the two barges must be shown to have actually contributed to the sinking of the Lightship. This is not the correct rule. Upon such a violation of the statutory regulations, the burden is placed upon the barges to show that this violation could not have contributed to the collision, and not whether it did so contribute.

We do not think the barges met this heavy burden."

(Emphasis supplied by Court.) 183 F.2d at 680.

See also The New York Marine No. 10, 109 F.2d 564 (2d Cir. 1940); In re Pacific Mail S.S. Co., 130 Fed. 76 (9th Cir. 1904); Howe v. Brooks, 329 F.2d 35 (4th Cir. 1934).

The fact that negligence of ship's personnel may have contributed to the casualty in no way affects the application of the Pennsylvania Rule to a shipowner's attempt to limit liability. As was stated in The Eagle Wing, 135 Fed. 826, 832 (ED Va. 1905):

"The faults on the part of The Eagle Wing consist not only in error and negligence on the part of her navigators in the management and control of the vessel, but there was an initial fault, serious in its character, in that an important statutory requirement was violated in the selection of the vessel's mate. ... the failure to comply with statutory requirements and regulations has frequently received the severest condemnation of the courts, and, when such an omission is clearly established, the presumption is that it did contribute to the collision, unless the contrary is obviously apparent, and this presumption attends every fault connected with the occurrence; and an obligation is imposed to show not only that it probably did not so contribute, but that it could not have done so. *Pennsylvania v. Troop*, 19 Wall. 125, 22 L.Ed. 148; *Martello v. Willey*, 153 U.S. 64; *The Bernicia* (D.C.), 122 Fed. 886; *The Alabama* (4th Cir.), 126 Fed. 332, 61 C.C.A. 238."

Although most of the cases cited above deal with manning violations, there is no doubt that the Pennsylvania Rule is applied with equal vigor in cases of violations involving required shipboard equipment. The Martello v. Willey, 153 U.S. 64, 38 L.Ed. 637 (1894); The Bolivia, 43 Fed. 173 (EDNY 1890), reversed on other grounds, 49 Fed. 169 (2d Cir. 1891).^{24/} The rationale to be applied to statutory equipment requirements is well illustrated by the following two cases. If a vessel takes proper precautions to have on board a good fog horn and the fog horn becomes out of order at sea through no fault of the vessel, the Pennsylvania Rule will not apply. The Trave, 55 Fed. 117 (SDNY 1893), affirmed 68 Fed. 390 (2d Cir. 1895), cert. denied 163 U.S. 692 (1895). However, if it appears that the fog horn was not properly tested before the voyage to make certain that it was fit for use, the Pennsylvania Rule applies and the vessel will be held. The Niagara, 84 Fed. 902 (2d Cir. 1898). It is

^{24/} This Court in The Denali, 112 F.2d 952 at 955, (9th Cir. 1940), pointed out the pronouncement of the Supreme Court in The Martello v. Willey that:

"This is a presumption which attends every fault connected with the management of a vessel, and every omission to comply with a statutory requirement or with any regulation deemed essential to good seamanship." 153 U.S. 64 at 74.

precisely this reasoning which must bar the CHICKASAW from limitation.

The recent case of Greater New Orleans Expressway Com'n v. Tug Claribel, 222 F.Supp. 521 (ED La. 1963), affirmed sub nom. Coleman v. Jahncke Service, Inc., 341 F.2d 956 (5th Cir. 1965), shows that the failure of a shipowner to properly equip a vessel will compel denial of limitation even when such failure does not amount to a statutory violation. The District Court denied the petition for limitation of liability because the tug's compass had not been checked or calibrated since its installation and because neither the captain nor the pilot of the tug knew how to make proper use of the compass or to compensate for its deviation:

"The tug owner has a duty ... to send the vessel out prepared to meet conditions which are likely to befall the vessel. It is the owner's duty to see to it that a vessel's equipment is in safe working order. In re Jacobson, D.C. Tex., 1931, 52 F.2d 179. We hold that it failed to do so."

222 F.Supp. at 525.

Unlike the fathometer or radio direction finder, there is no statute or regulation requiring that a ship be equipped with a compass. The Fifth Circuit nevertheless affirmed the decision of the lower court, stating:

"The evidence generously supports the District Court's finding that shortcomings of crew and

compass were a proximate cause of the accident, though not the sole proximate cause." 341 F.2d at 959.

4. The Denali.

Perhaps the foremost authority applying the Pennsylvania Rule in limitation of liability actions is the opinion of this Court in The Denali, 23 F.Supp. 145 (W.D. Wash. 1938), reversed 105 F.2d 413 (9th Cir. 1939), former opinion adhered to on rehearing 112 F.2d 952 (9th Cir. 1940), cert. denied 311 U.S. 687 (1940).

The DENALI stranded in British Columbia waters while on a voyage from Seattle to Alaska. The shipowner filed for exoneration from or limitation of liability. Cargo claimants contested limitation, claiming unseaworthiness in the vessel's compasses, charts, and division of watches by the ship's officers, the latter point becoming the focal point of the case. 46 U.S.C. 223 requires that a vessel "shall have in her service and on board three licensed mates, who shall stand in three watches while such vessel is being navigated." The DENALI utilized two of its three mates to stand watches and an especially employed pilot in place of the chief mate as a watch officer. At the time of the strand, the pilot was on watch and was being assisted by the third mate. There was a complete absence of any evidence tending to show that either one was affected by fatigue or had stood an

unduly long watch prior to the casualty. The District Court declined to find a statutory violation under these circumstances and held that the DENALI was seaworthy with respect to the manning of the vessel. That Court found that the stranding was caused by strong currents in the area which set the vessel into the reef. As such, the casualty was held to be the result of an error in navigation, and the owner was entitled to exoneration.

On appeal, this Court reversed and held that there was a statutory violation. The purpose of the statute was found to be to insure that each of the three mates stand two four-hour watches per day. In fact, it was found that the mates were standing a longer period of watch than four hours on the DENALI and the pilot was alternating six-hour watches with the master. Because of these long hours and the use of the pilot, the owner was found to be operating the vessel in violation of the three watch provision of the statute and the Court applied the Pennsylvania Rule. Limitation was denied and cargo owners were held entitled to recover their damages. As stated by Judge Denman, quoting from the Court's previous decision in The Princess Sophia, 61 F.2d 339, 347 (9th Cir. 1932):

"The rule simply is that the violator is penalized with the burden of showing that the violation not only probably did not cause the accident, but that it could not have done so. This burden it is

frequently extremely difficult, if not impossible,
for the violator to discharge, in the nature of
things; and herein lies the true penalty imposed
upon him." (Emphasis supplied by the Court.)

105 F.2d at 418.

Thus, although there was no showing that the owner had devised the watch scheme found to be in violation of statute (in fact the owner had provided the three mates plus the pilot and the master) and although there was no showing that a pilot and mate are less able to properly navigate a ship than is a mate alone, the statutory violation was held sufficient to preclude limitation of liability. The holding of this Court in The Denali shows that in the Ninth Circuit, probably more so than elsewhere, a shipowner is held to strict accountability for a breach of safety legislation and must bear a heavy burden of exculpation. The forthright holding in The Denali can only be read as requiring the application of the Pennsylvania Rule in the instant case.

5. The Pennsylvania Rule - Conclusion.

The Appellant has not contested the lower Court's finding that the CHICKASAW was not provided by its owners with a proper fathometer or other deep-sea sounding device. No more is needed to show a violation of 46 C.F.R. 96.27-1, requiring that each vessel "shall be fitted with an efficient mechanical or electronic deep-sea sounding apparatus." Indeed,

in view of the complete lack of inspection and maintenance of the fathometer (as conceded by Appellant's own expert) and the scrapping in Japan of the mechanical deep-sea sounding machine, a violation of the regulation can hardly be contested.^{25/} The record of neglect of the fathometer, extending as it does over many years of time and three coats of paint, effectively precludes Waterman from claiming that it had no privity and knowledge with respect to such deficiency. And, as is pointed out in section II E 3, infra., certification by the Coast Guard cannot be used to shift the shipowner's responsibilities. Causation between the defective fathometer and the stranding is therefore provided by the Pennsylvania Rule, and it is unnecessary that the Appellees prove, by Jensen's testimony or otherwise, that such deficiency contributed to the stranding.

The Government also contends that the decision of the lower court must be affirmed because of Waterman's statutory violations with respect to the radio direction finder. As with the fathometer, Waterman's neglect of the radio direction finder extends over a period of many years and the

25/ A preponderance of the evidence has been held sufficient to prove a statutory violation, thereby invoking the Pennsylvania Rule. Wood v. United States, 125 F.Supp. 42, 48 (SDNY 1954); Palmer v. Merchants' & Miners' Transp. Co., 154 Fed. 683 (D. Mass. 1907); The Duquesne, 262 Fed. 1 (3d Cir. 1920).

fact that the RDF had not been properly corrected by annual comparison of RDF bearings with visual bearings is uncontradicted. The statutory violation is apparent and privity and knowledge of such violation is obvious from the testimony.

The regulations requiring a vessel to be equipped with an "efficient" fathometer and an "efficient" radio direction finder are clearly the very type of safety regulations contemplated under the Pennsylvania Rule. Compliance with either of these statutory requirements would have enabled the CHICKASAW to determine her position and thus avoid steaming into Santa Rosa Island at 16 knots. The Appellant's burden of proving that the absence of such equipment could not have contributed to the casualty is insurmountable. As stated by the Supreme Court, in The Pennsylvania, "Such a rule is necessary to enforce obedience to the mandate of the statute." If the Rule serves that purpose here, and thus helps to prevent future casualties, the function of the Rule will have been well served.

D. The Evidence Supports the Finding of Privity, Knowledge and Fault by Reason of Waterman's Delegation of Authority to the Master.

The lower court found (1) that Waterman Steamship Corporation failed to exercise due diligence to make the HICKASAW seaworthy, and (2) that the unseaworthiness of the HICKASAW existed with the privity and knowledge, and actual fault, of Waterman.

Finding of Fact 6, dealing with Waterman's privity, fault and knowledge, is divided into two paragraphs. The first paragraph finds in part:

"As to repairs, Waterman placed all authority, including authority to decide whether repairs should be made at all, with the master, and had in the Far East no supervisory or managerial personnel to carry out its obligation to exercise due diligence to make the vessel seaworthy. Waterman therefore had delegated to the master its entire managerial responsibility as respects such repairs at the commencement of this voyage and therefore Waterman had knowledge, privity and is at fault for the decision not to repair the fathometer."

The Appellant does not contest the Court's finding that all authority concerning repairs had been delegated to the master, and, indeed, there is no evidence to the contrary. Perhaps the clearest testimony in this regard comes from Captain Frank Murdock, Waterman Steamship Corporation's Port Captain at Mobile:

"Q Captain, are you primarily responsible for the maintenance and repair of the deck equipment on Waterman ships?

"A Of the deck department?

"Q Yes, in the deck department.

"A May I clarify that?

"Q Surely.

"A In our steamship company all repairs, when you say repairs, are -- the repairs are requested by the master of the chief mate of the deck department and the steward's department and they are turned over to the chief engineer, who in turn turns them over to the port engineer. I am not charged with the repairs of the vessel.

"Q Let me see if I understand this correctly, Captain, then. Is it your testimony that repairs to the equipment in the deck department are initiated only at the request of the master?

"A Only at the request of the master unless I find something wrong, in which case I request it myself.

"Q I will ask you a question or two about your finding something wrong in a minute. For the moment I want to lay that aside and inquire as to whether if you have not found anything wrong, then the only basis upon which a repair is made to any equipment in the deck department would be on the request of the master. Is that right?

"A On the request of the master or the recommendation of the Coast Guard or on the recommendation of the FCC or any of the regulatory bodies.

"Q Apart from the recommendation of these people does the company have any program of its own, through you or through any other of their people here in Mobile, for finding out whether there is any equipment in the deck department that needs repairing?

"A We have no program beyond the setup as I told you on the repairs. The repair requisition comes in and it is handled as I told you."

(T. 1371, 1372.)

The testimony of Captain Anthony, Waterman's vice president in charge of operations, is to the same effect.
(T. 1177.)

Based on this testimony, there can be no doubt that the Trial Court was correct in finding that Waterman did place "all authority, including authority to decide whether repairs should be made at all, with the master" and that "Waterman had therefore delegated to the master its entire managerial responsibility as respects such repairs at the commencement of this voyage." As previously discussed in section I, such a total delegation of authority to the master, under circumstances in which Waterman had the opportunity to

exercise control but declined to do so, supports--indeed compels--the Court's finding of privity, knowledge and fault.

E. The Evidence Supports the Finding of Direct Fault on the Part of Waterman.

Whereas the first paragraph of Finding of Fact 6 finds lack of due diligence and privity and knowledge in Waterman by reason of its delegation of authority to the master, the second paragraph of this finding does not deal with delegation of authority but places the privity, knowledge and fault directly upon Waterman Steamship Corporation:

"Due diligence was not exercised to make the SS CHICKASAW seaworthy and that the loss of the vessel, the absence of due diligence, the unseaworthiness of the fathometer occurred with the privity, fault and knowledge of the Waterman Steamship Corporation."

The record fully supports the lower Court's finding (again not contested by Appellant) that the practices and procedures, or lack of same, employed by Waterman Steamship Corporation are sufficient to charge it, not only with privity and knowledge, but with direct fault in connection with the unseaworthiness and subsequent stranding of the CHICKASAW. As is noted in section I F, supra, if direct contributing fault is shown on the part of a shipowner,

limitation will be denied with no need for a consideration of privity and knowledge.

The testimony with respect to Waterman's direct fault can be conveniently divided into the following major categories:

- (1) The failure of Waterman to instruct ship's personnel concerning proper maintenance and repair of navigational equipment;
- (2) The failure of Waterman to make proper inspection to determine that navigational equipment was properly maintained and repaired;
- (3) Waterman's improper reliance upon the Coast Guard, Federal Communications Commission, and other entities to justify its lack of maintenance and inspection.

Although practically the entire transcript is replete with evidence demonstrating each of these deficiencies, we will undertake to review some of the more graphic testimony in each category.

1. Waterman's Failure to Instruct.

While the lack of instruction by Waterman is apparent from the testimony of every crew member of the

CHICKASAW, as well as Waterman's shoreside personnel, the following testimony of Captain Patronis is typical:

"Q When you told him you would accept the CHICKASAW did Captain Murdock tell you anything about her?

"A He told me she was a good ship.

"Q Did he tell you anything more specific than that?

"A No.

"Q At the time that he called you up and asked you if you wanted to take the CHICKASAW did he tell you anything about her?

"A Not that I recall.

"Q Now, did you have any further conversations or discussions of any kind with Captain Murdock from that time until the time that you first came aboard the CHICKASAW as master?

"A Concerning the ship?

"Q Concerning the ship.

"A No.

"Q Before you actually came aboard as master, did you have any discussions concerning the ship with anyone else from Waterman Steamship Corporation?

"A No." (T. 162, 163.)

* * * * *

"Q Prior to the time you took the CHICKASAW out of Mobile, did you have any discussion with any Waterman personnel concerning what should be done with regard to the maintenance of the ship or her navigation equipment?

"A No.

"Q Did you have any discussion with any Waterman personnel as to the circumstances under which you were supposed to use radar?

"A No.

"Q Did you have any instructions from any Waterman personnel as to what you were to do if you found that the radar broke down and you were in a foreign port and couldn't get it repaired there?

"A No.

"Q Did you have any instructions from any Waterman personnel as to what to do if the radar broke down and you could not obtain parts for her in her next port of call?

"A No." (T. 165, 166.)

* * * * *

"Q Prior to that time [i.e., when the radar was found to be in need of repair] had you ever had any instructions from the owners about what to do if

the radar went out?

"A No.

"Q Did you have any instructions from them as to whether radar parts which were not on board might be flown in from the United States to be installed in another port?

"A No.

"Q They never told you anything about it?

"A No." (T. 223.)

The testimony of the other officers is to the same effect. Chief Mate Filipponi stated that there was no officer aboard the CHICKASAW who had particular responsibility for the navigation equipment (T. 298); that he had never received any instructions or orders of any kind with respect to his duties aboard the CHICKASAW (T. 383, 384); that he had never received any instructions or orders concerning the procedures to be used in maintaining any of the equipment aboard the CHICKASAW (T. 387, 388); and that he, in fact, had no idea what spare parts were available on board the CHICKASAW for any of its equipment (T. 389, 390).

It is also clear that Everett Steamship Corporation, Waterman's General Agent in the Far East, received no more instruction than did Waterman's shipboard personnel. Mr. Nelson, Everett Steamship Corporation's operations manager and branch manager in Yokohama, stated

hat Everett had never received any instructions from Waterman concerning procedures to be followed with respect to nonoperative navigational equipment aboard Waterman ships. T. 1116, 1117.)

What instructions, then, did Waterman issue with respect to navigational equipment? There was on board a book of general instructions (Joint Exhibit 51) which was, however, so outdated that no mention was made of any of the modern navigational instruments upon which vessels commonly rely, including the radar, fathometer, and radio direction finder. Waterman did not see fit to replace or supplement this totally inadequate manual. (T. 268; 269; 1218-1222; 390.) The only current instructions Waterman deemed it necessary to issue are found in Joint Exhibit 29, which, in effect, directed masters of Waterman vessels not to accomplish repairs in foreign ports. While repairs to the radar, radio and gyrocompass were permitted by this Order, no repairs to the fathometer, RDF or other equipment were to be accomplished except in a "real emergency."

2. Waterman's Failure to Inspect.

Waterman's delegation to the master of all authority to repair and maintain navigational equipment, coupled with Waterman's failure to instruct or establish proper procedures for such maintenance and repair, would appear less culpable had Waterman at least inspected such equipment

periodically. The failure to conduct proper inspections has been held sufficient in itself for denying limitation. ^{26/}

The need for competent, periodic inspection is all the more obvious considering the plight of the CHICKASAW as she blindly approached Santa Rosa Island. The inoperative condition of the fathometer, radio direction finder and radar are all directly traceable to Waterman's neglect. As has been previously noted, an annual inspection would have disclosed

26/ "Petitioner had no system or regulation for regular inspection or drydocking, although it owned and operated about thirty vessels. No routine inspection had ever been made of the Trenton. Thus it closed its eyes to what would have been obvious and readily revealed upon a proper and periodic inspection. The record compels the conclusion that the supervision of the vessel was casual and was performed in an indifferent and perfunctory manner. The corporation is chargeable with knowledge of what its managing officers or supervisory employees might have known, and were bound to know, had they made a proper inspection." In re Petition of Henry Du Bois' Sons Co., 189 F.Supp. 400, 403 (SDNY 1960). See also Sanbern v. Wright & Cobb Lighterage Co. (The Hoffmans), 171 Fed. 449, 455 (SDNY 1909); Avera v. Florida Towing Corp., 322 F.2d 155, 166 (5th Cir. 1963); Austerberry v. United States, 169 F.2d 583, 593 (6th Cir. 1948).

the defects in the fathometer. (T. 693.) Both Captain DeSanty, the Los Angeles Port Warden, and Captain Kuhne, claimant's expert, agreed that a proper inspection by the shipowner would also have uncovered the absence of a current RDF correction table. (T. 796-799; 1076-1078.) The defective radar tells the same story. No evidence contradicts Mr. Harrison's testimony that the deficiencies which rendered the radar inoperative would have been discovered in a routine inspection. (T. 696.)

There is, of course, no doubt that none of the navigational equipment on board the CHICKASAW had been inspected or serviced within recent memory. Chief Mate Filippone stated that the fathometer had not been repaired, inspected or serviced during the time he had served on board, i.e., since April 1958. (T. 390.) The last record of any work on the fathometer was five years prior to the stranding. The same lack of care was obvious in the radio direction finder. (T. 353, 354.) Former Chief Mate English also agreed that although his duties on board the CHICKASAW included maintaining the deck gear of that vessel, they did not include the maintenance of any navigational gear. (T. 740.)

The absence of any effective inspection by Waterman is also apparent from the testimony of Captain Anthony, Waterman's vice president in charge of operations, and the testimony of Captain Murdock, Waterman's Port Captain in Mobile. Captain Murdock's testimony concerning his "shipboard inspections" is enlightening:

"Q Is there a routine you have established in connection with these shipboard calls?

"A Yes, among my other duties as port captain, the maintenance of the vessels on the topside is part of mine, and I have a routine established that I proceed -- well, on going aboard the ship I will go to the chief engineer, talk to him, go to the captain and talk to him, and then I start from the flying bridge, actually, and I come down and inspect the flying bridge, come down to the bridge into the chart room, wheelhouse, down to the passenger quarters, the crew's quarters, out onto the main deck, forward, all around, into the storerooms, back aft, see about the mooring lines, check the rust conditions, cargo gear, steam smothering apparatus.

"Q I didn't hear you say, Captain, and I just didn't get the entire answer -- did you indicate whether you visited the bridge area?

"A I do visit the bridge area. I go through the chart room and I go through the wheelhouse with the dual purpose in mind, I look to see the paint conditions, whether it is kept clean, whether it is orderly, whether it is good house-keeping.

"Q Do you ever check any of the equipment or occasionally check any of the equipment up in this area?

"A I occasionally check navigational equipment. Ordinarily -- it is not a routine thing that I check navigation equipment, but I occasionally do check it. (T. 1359, 1360.)

Captain Anthony, who made an inspection of the CHICKASAW in the Fall of 1961, was even less specific concerning any inspection of the bridge area:

"Q In your testimony yesterday you spoke of inspecting the chart room and the bridge, among other parts of the ship.

"A That is right.

"Q Did you make any inspection of the chart room and the bridge while the ship was in port this time?

"A I don't specifically remember making any inspection of the chart room and the bridge. I could have, but I don't specifically remember it." (T. 1197.)

Both Captain Anthony (T. 1224) and Captain Murdock (T. 1378) admitted that Waterman made no inspection or inquiry to determine whether a current RDF correction table had been obtained. As stated by Captain Murdock:

"Q Did you have any program for seeing to it that a table of corrections was kept on board from the one inspection to the next?

"A We don't have a program for that.

"Q And I take it neither you nor anyone else regularly makes any inspections on shipboard to see if there is such a table?

"A No." (T. 1378.)

Waterman's Port Engineer, Mr. Weekley, confirmed that no reports are required on the condition of shipboard navigational equipment and that Waterman's engineering department has no established procedure for inspection of such equipment. (T. 1259-1267.) His testimony in this regard concludes as follows:

"Q Just to sum the thing up, you don't do anything with respect to the radio direction finder or the radar or the gyro unless requested by someone in the deck department of the ship?

"A That is all.

"Q And so far as the fathometer goes, you have described everything that you do?

"A Yes, sir.

"Q Then again, to sum up a little further, while you have here in Mobile fairly complete records to tell whether the engines are operating satisfactorily, you have no records here which would

advise you as to whether the fathometer or the gyro or the radar is operating satisfactorily. Is that a correct summary?

"A Well, we leave the records to the deck department, and on the repairs, for instance, that would be a specialized repair and we are not familiar with the operation.

"Q I am not criticizing you in any way, but I just want to get the record straight in this particular respect. That is correct, is it not?

"A Yes, sir." (T. 1266, 1267.)

Captain Anthony also pointed out that Waterman does not review the deck department logs to determine the condition of navigational equipment:

"Q There was some testimony that in the engineering department there is a practice for the engineering department to receive the logs and to check them to see what they indicate as to the mechanical condition of various units of equipment on the vessel. Is there any comparable practice so far as the deck department is concerned?

"A No, we don't read the logs unless there is some specific information we want to seek in the log." (T. 1383.)

If Waterman's inspection in her home port was

deficient, any inspection or supervision while the CHICKASAW was in the Far East can only be called nonexistent. Captain Anthony, Waterman's vice president in charge of operations, did not hesitate to admit that Waterman divorced itself from all such responsibility:

"Q Captain, referring again to operations out in the Far East, you have described in some detail your own activities here to see to it that ships were in good condition when they were in Mobile or when you were around them elsewhere in the United States. What sort of affirmative program did the company have to see to it that ships were seaworthy when they left ports in the Far East, coming back to the United States?

"A The program to accomplish that is vested in the master or the chief engineer of the vessel -- the master primarily.

"Q Did you have any program at all with respect to checks or controls by any supervisory personnel in respect to the condition of the vessel when she started on her voyage back from a Far Eastern port to the United States?

"A We had no representatives to perform any such check in the Far East.

"Q To answer my question, is it true, then, that there was no program of that sort at all out in the Far East?

"A From shoreside personnel?

"Q Yes.

"A No.

"Q You mean no, there was no program?

"A There is a continuing program of the master and a continuing responsibility to maintain the seaworthiness of the vessel.

"Q I appreciate that, Captain. We all know that the captain has serious responsibilities in that respect. The question I am interested in finding out is whether there is any program of supervision by shoreside personnel out in the Far East.

"A Absolutely none." (T. 1172-1174.)

In short, the sum and substance of Waterman's inspection of shipboard navigational equipment consisted, at the most, of asking the master or chief mate, "Is your navigation equipment working satisfactorily?" (Captain Anthony, . 1156.) And if no deficiency were reported by the master, Waterman would be unlikely to hear of it. Captain DeSanty testified that during his many years inspecting vessels he had never observed a ship with as many things wrong with its navigational equipment at the same time as was the case with the CHICKASAW. (T. 820.) It is submitted that such a state of affairs can only be the result, and not an unexpected result, of the vacuum created by Waterman's abdication of authority.

3. Waterman's Improper Reliance upon the Coast Guard, Federal Communications Commission and Other Entities.

In an attempt to justify its failure to inspect and maintain the CHICKASAW's navigational equipment, Waterman consistently makes reference to the Coast Guard and FCC inspections, as well as to the services of their private contractors. Captain Murdock, Waterman's Port Captain, testified that Waterman relies completely upon RCA or Mackay to see that the radio direction finder meets FCC specifications each year. (T. 1365.) As explained by Captain Murdock, "We have hired people to do it and we consider that we have an automatic check in the FCC and it is being done." (T. 1376.) "We are meeting a very tough regulatory body, the FCC, and each year they examine the ship. This we consider a check." (T. 1377.)

Captain Anthony agreed:

"Q Did you have any routine for checking the accuracy of the radio direction finder other than the annual FCC check?

"A Only the question to the masters of the vessels, is their navigation equipment working satisfactorily." (T. 1210.)

The testimony of Mr. Hall, the FCC inspector, and Mr. Kroh, of RCA Service Company, shows how unfounded was

Waterman's complete reliance. Mr. Hall explained that the FCC's determination that the radio direction finder has been properly calibrated is based solely upon a statement received from the owner or the master:

"Q . . . at that time again all that the FCC gets is a piece of paper prepared by someone else saying that there has been calibration or that the calibration has been checked. Is that correct?

"A That is correct.

"Q So that if the ship continues on her way for her normal life, say, 20 years, it may well be with respect to a particular ship that at no time does the FCC ever get anything except a statement in writing that someone else has calibrated the radio direction finder?

"A That is correct." (T. 971-972.)

Mr. Kroh, of RCA, was emphatic in his testimony that neither he nor Mr. Hall made any comparison of RDF and visual bearings, as is required annually. (T. 974-975.)

Waterman, however, was apparently completely unaware of the nature of examination conducted by the FCC and RCA. Captain Anthony, Waterman's vice president in charge of operations, stated the following:

"Q Captain, yesterday Mr. Kroh of the RCA testified and Mr. Hall of the FCC testified. As I understand their testimony it was that you cannot

check the directional accuracy of the radio direction finder when the ship is in port . . . Are you familiar with the fact that routinely they do not check the accuracy of the RDF?

"A Am I familiar with the fact that they do not check the accuracy of it?

"Q Yes.

"A I have heard since the CHICKASAW grounded that they do not check the accuracy of it. I mean, I have heard this stated."

(T. 1232, 1233.)

The story of the radar is much the same. Again, there is no record of periodic inspection or maintenance. Although there is a suggestion that Waterman relied to some extent upon Raytheon, Captain Murdock, Waterman's Port Captain, was frank to admit that he had never made any inquiry of Raytheon concerning the scope and type of their inspection. (T. 1370-1371.)

With respect to the fathometer, there is apparently no contention that Waterman ever relied upon anyone, except perhaps the Coast Guard. Inspection and maintenance were just nonexistent.

Throughout the trial, Appellant made much of the fact that the CHICKASAW had obtained a Coast Guard

certificate. The record clearly indicates, however, that the Coast Guard is not in the business of carrying out a shipowner's routine inspection and maintenance. LT Walsh, who actually inspected the CHICKASAW, made it clear that he relied solely upon shipboard personnel to inform him of any defects in navigational equipment. (T. 1303-1304.) Neither the fathometer (T. 1307), the radio direction finder (T. 1311), nor the radar (T. 1314) is normally turned on during a Coast Guard inspection. The foregoing was confirmed by Captain DeSanty, who performed hundreds of such inspections for the Coast Guard. In fact, as pointed out by Captain DeSanty, "inspection" is hardly a correct term, for the function of the Coast Guard is merely to determine that the required navigational equipment is on board and is reported by shipboard personnel to be in good operating condition. (T. 834-836.) Obviously, under these circumstances the Coast Guard cannot know more about a ship's equipment than is reported to them by her personnel. And if proper maintenance and inspection are not carried out by the shipowner, the mere obtaining of a Coast Guard certificate cannot cure the deficiencies.

In summary, the shipowner is under a duty to judge his own vessel's seaworthiness and may not rely upon the Coast Guard or any other body to discover defects that he could find with the exercise of reasonable care. As was stated by the Ninth Circuit in States Steamship Co. v. United States (The Pennsylvania):

"'In proceedings for limitation the owner may not escape liability by giving the managerial functions to an employed person acting as its agent, whether the person be corporate or otherwise.' Nor can the company escape responsibility for taking due precautions reasonably required by the apparent dangers by a mere reliance upon an assumption that the Coast Guard and the American Bureau of Shipping have taken care of these matters." 259 F.2d 458 at 470.

to the same effect, see Sabine Towing Company v. Brennan, 2 F.2d 490, 494 (5th Cir. 1934), cert. denied, 293 U.S. 611, 9 L.Ed. 701 (1934).

F. Appellant Has Failed to Carry its Burden of Proof as to Lack of Privity and Knowledge.

Returning to Appellant's expressed assignment of errors, it should be emphasized that Waterman failed to attack as being clearly erroneous Finding of Fact 6 that the master had been delegated the "managerial responsibility as respects such repairs (as of the fathometer) at the commencement of this voyage" from Yokohama, the appeal in this regard being limited to a claim of error of law that such a delegation by Waterman could result in imputed privity and knowledge.

The burden of proof under the Limitation of Liability

Act is on the owner, once negligence has been shown, to prove that "... it had no privity or knowledge of negligence, or that there was no privity or knowledge on the part of those to whom it had delegated the duties of commanding, maintaining, and operating the vessel." Austerberry v. United States (The C.G.R. 180), supra, 169 F.2d at 594. This burden shifts to the shipowner even if unseaworthiness is shown to be only one of the causes of the disaster. In re Eastern Transp. Co. (The Calvert), 37 F.2d 355, 358 (D.Md. 1929). See also Great Atlantic & Pacific Tea Co. v. Brasileiro, supra, 159 F.2d at 664-665.

As stated by Gilmore and Black, p. 705:

"It seems reasonable that the shipowner, who invokes the Limitation Act, should bear the burden of proving the absence of privity or knowledge: as to that branch of the case he is the moving party and the facts are peculiarly within his knowledge. This is evidently the Supreme Court's view of the matter; in Coryell v. Phipps Justice Douglas commented, citing earlier cases: 'Thus respondent [shipowner] has satisfied the burden of proof, which is on those who seek the benefit of sec. 4283 [i.e., § 183], of establishing the lack of privity or knowledge.'"

III

Appellant has Failed to Prove that the Cargo Loaded Prior to December 25, 1961, is Subject to an Exception Under COGSA.

Waterman, for what we believe to be the first time in this case (and without citation of any authority), raises an issue that exoneration should have been allowed as to cargo loaded aboard the CHICKASAW before December 25, 1961, when Third Officer Jensen found the fathometer to be malfunctioning. See Specification of Errors No. 2. New matter may, of course not be raised on appeal,^{27/} but, nevertheless, we would like to point out that there is no finding that this particular cargo was lost due to errors of navigation or any of the other exceptions to liability provided by COGSA (46 U.S.C. 1304). Instead, all cargo loss was found to have been due to unseaworthiness occurring at each of the ports in the Far East visited by the ship because of Waterman's failure to exercise due diligence (FF 4). Waterman thus failed to carry its burden of proof as to application of a COGSA exception to the entire loss, which necessarily means that it also failed to carry the same burden of proof

^{27/} A/S Ludwig Mowinckels Rederi v. Accinanto (The Ocean Liberty), 199 F.2d 134, 145 (4th Cir. 1952), cert. denied 345 U.S. 992, 97 L.Ed. 1400 (1952); Minnich v. Gardner, 292 U.S. 48, 78 L.Ed. 1116, 1119-1120 (1933).



as to a part of the cargo loss. As Judge Learned Hand said in Great Atlantic & Pacific Tea Co. v. Brasileiro, 159 F.2d 661 (2d Cir. 1947), cert. denied 331 U.S. 836, 91 L.Ed. 1849 (1947):

"If the (ship) owner would free itself from liability for such damage the doctrine of The Valescura (293 U.S. 296, 79 L.Ed. 373 [1934]) imposes upon it the hard burden of proving how much was not caused by the wrong, a burden whose discharge ordinarily carries such small hope of success that it may not care to make the attempt." 159 F.2d at 665.

As we point out above, the findings are that the generally poor condition of the fathometer pre-dating December 25, 1961, was due to the direct fault of Waterman. However, even if the findings did not contain this additional ground for denial of limitation (in FF 4), it would make no difference in a situation of common carriage of cargo under bills of lading, as opposed to a charter of a ship warranted on delivery as being seaworthy,^{28/} that the unseaworthiness originated after the

^{28/} COGSA does not apply to charters unless expressly incorporated (46 U.S.C. 1305); it only covers, by its own terms, cargo being carried under bills of lading (46 U.S.C. 1300, 1301 [b] and 1302. And the Limitation Act is not available to shipowners chartering out their vessels. Cullen Fuel Co. v. Hedger, 290 U.S. 82, 78 L. Ed. 189 (1933); (Cont'd.)

cargo was loaded aboard. Great Atlantic & Pacific Tea Co. v. Brasileiro, supra, 159 F.2d at 665. See also Petition of United States (The Edmund Fanning), 105 F.Supp. 353 (SDNY 1952), modified on other grounds, 201 F.2d 281 (2d Cir. 1953), where the sole unseaworthiness occurred at a time subsequent to the cargo's coming aboard.

Finally, 46 U.S.C. 1304, which sets out the various conditions for exoneration, certainly contemplates that the unseaworthiness can occur after cargo has been loaded since it extends exculpation to the shipowner for actions which could only take place after loading, such as deviation in certain circumstances and disposal of dangerous cargo before arrival at destination.

28/ cont'd

Capitol Transp. Co. v. Cambria Steel Co., 249 U.S. 334, 63 L.Ed. 631 (1919); Pendleton v. Benner Line, 246 U.S. 353, 62 L.Ed. 770 (1918); Luckenbach v. W. J. McCahan Sugar Ref. Co., 248 U.S. 139, 63 L.Ed. 170 (1918).

IV

CONCLUSION

The judgment of the lower Court denying limitation of liability is based upon two grounds, both of which are in full accord with existing case law, including decisions of this Circuit. The first ground is the imputation of privity and knowledge to Waterman of the master's failure to carry out the managerial duty of making the vessel seaworthy as to her fathometer in circumstances where Waterman itself could have performed that duty but declined to do so. The second ground is the direct fault of Waterman in failing to inspect the fathometer or institute any program for its maintenance, this resulting in the condition of "generally bad repair" as found by the lower Court.

The judgment of the lower Court is supported not only by the evidence respecting the fathometer but also by the evidence demonstrating Waterman's neglect of the radar, radio direction finder and deep-sea sounding machine.

Appellant's attack on causation is meaningless in the face of the Pennsylvania Rule, the burden of which has not been met, nor could it be met in the circumstances of this case.

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The scientific aspect of the problem is concerned with the question of how life arose from non-life. The philosophical aspect is concerned with the question of whether life is a necessary part of the universe or whether it is a mere accident. The paper then proceeds to a discussion of the various theories of the origin of life. It is shown that the most plausible theory is that life arose from non-life through a series of chemical reactions. This theory is supported by the discovery of the RNA world and the discovery of the origin of the genetic code. The paper then discusses the question of the evolution of life. It is shown that the evolution of life is a necessary part of the universe and that it is not a mere accident. The paper concludes by discussing the question of the future of life. It is shown that the future of life is uncertain, but that it is likely to continue to evolve.

It is therefore respectfully submitted that the decision of the lower Court must be affirmed.

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CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules except as to the length of the brief, concerning which an Order has been entered permitting its filing.

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CERTIFICATE OF SERVICE

I, JOHN F. MEADOWS, attorney for Appellee United States of America, certify that on January 26, 1968, I served on Appellant Waterman Steamship Corporation a copy of the foregoing Answering Brief for the United States, by inserting three copies of said brief in an envelope, properly stamped, addressed and deposited in the United States Post Office, and addressed to:

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Affiant also certifies that on said date he served on Appellees Gay Cottons, Inc. and Salom Baby Wear, a copy of the foregoing Answering Brief for the United States, by inserting one copy of said brief in an envelope, properly stamped, addressed and deposited in the United States Post Office, and addressed to:

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Subscribed and sworn to before me
this 26th day of January 1968.

Deputy Clerk, U. S. District Court
Northern District of California

No. 21767

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Petition of WATERMAN STEAMSHIP CORPORATION, a corporation, owner of the vessel SS CHICKASAW, for exoneration from or limitation of liability,

GAY COTTONS, INC., *et al.*,

Cargo Claimants,

SHALOM BABY WEAR,

Cargo Claimant,

UNITED STATES OF AMERICA,

Cargo Claimant.

On Appeal From the Judgment of the United States
District Court for the Southern District of California.

**REPLY BRIEF OF APPELLANT WATERMAN
STEAMSHIP CORPORATION.**

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FILED

MAY 1 1968

WM. B. LUCK, CLERK

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I.

THE FINDINGS OF FACT.

A basic misconception with respect to the Findings of Fact of the lower court is apparent from the very inception of appellees' briefs and permeates their entire argument thereafter. Appellees assert that the lower court found, in the second paragraph of Finding of Fact 6 [Clk. Tr. p. 848] that appellant, the negligence of Captain Patronas aside, failed to exercise due diligence to make the CHICKASAW seaworthy and had privity or knowledge of the unseaworthiness of the

CHICKASAW's fathometer. Appellee, United States of America (hereinafter "The Government"), calls this the finding of Waterman's "direct fault" (see *e.g.* Government's answering Brief, pp. 7 and 73). Appellees Gay Cottons, *et al.* (hereinafter "private cargo"), consistent with their practice throughout, are not so direct, but the effect is the same; they too contend that the lower court found fault of appellant sufficient to deny exoneration and limitation of liability in addition to the negligence of Captain Patronas (see *e.g.* private cargo's brief, pp. 5, 24, 25, and 34). The arguments derived from this misinterpretation of the findings have two strands: First, that appellant, irrespective of Captain Patronas' negligence, failed to exercise due diligence to make the vessel seaworthy at and prior to the commencement of the voyage and thus was not entitled to exoneration; and, second, that, again irrespective of Captain Patronas' negligence, appellant had privity or knowledge of the unseaworthiness of the fathometer and therefore is not entitled to limitation of liability. The detail of these arguments and the facts utilized to support them will be analyzed in subsequent sections. However, it is worthwhile now to examine how appellees reach their erroneous conclusion with respect to the Findings of Fact and to demonstrate why this conclusion is erroneous.

Appellees accomplish their result by taking portions of selected Findings of Fact, shuffling them around, and splicing them together with data they imply forms the foundation of the findings, ignoring the rejection by the lower court of Findings of Fact embodying the matters they now seek to reintroduce. Specifically, private cargo takes the first two sentences of Finding of Fact 4 [Clk. Tr. p. 846] in which the Court found the CHICKASAW unseaworthy at the commencement of the voyage in question and skips over the

reasons for the unseaworthiness to the first full sentence in the third paragraph of Finding of Fact 4 [Clk. Tr. p. 847] dealing with the condition of the fathometer some two weeks after the stranding. They then omit entirely Finding of Fact 5 [Clk. Tr. p. 847], dealing with want of due diligence, and the first three-fourths of Finding of Fact 6, dealing with Waterman's alleged privity, fault and knowledge, and proceed directly to the second paragraph of Finding of Fact 6 to create the impression that this latter paragraph, rather than being merely a conclusion drawn from the remainder of Finding of Fact 6, has an independent life of its own relating to direct fault on the part of Waterman. (private cargo's brief, pp. 24 and 25). To this they then add the following language:

"To repeat briefly the evidence, a fathometer should be inspected annually [Rep. Tr. p. 693]. But nobody touched the CHICKASAW's fathometer during the five years before the stranding except to give it three coats of paint [Rep. Tr. p. 686]. How can it be contended then that either this condition, or the lack of due diligence, dated from December 25, 1961? And, how can it be contended that this is fault ascribable solely to Captain Patronas? For it represents at least five years of neglect and Patronas joined the ship on November 3, 1961 [Rep. Tr. p. 55], a bare three months before she was lost."

None of this latter is in the findings nor supported by the evidence.

Private cargo then returns (see private cargo's brief, pp. 34-36) to what they call the "even if" findings. They return to the gist of Findings of Fact 4 [Clk. Tr. p. 846] where the Court finds unseaworthiness because of uncertainty with respect to the condition of the

fathometer, weave in the finding that Captain Patronas failed to exercise due diligence by taking steps to ascertain the condition of the fathometer [Finding 5, Clk. Tr. p. 847], and then at long last turn to the meat of Finding 6 [Clk. Tr. p. 847] dealing with appellant's delegation of authority to the master. By this restructuring of the Court's findings, appellees seem to create two alternative grounds out of one:

(1) The CHICKASAW, so they allege, was found to be unseaworthy as a result of a longstanding condition of the fathometer, which condition existed as a result of the lack of due diligence of appellant and with appellant's privity or knowledge; and

(2) "Even if" the preceding ground for denying exoneration and limitation did not exist, this relief must be denied because the fathometer was unseaworthy due to uncertainty as to its condition. This uncertainty was known to Captain Patronas, who negligently failed to take any action with respect to it, and this negligence was with the privity or knowledge of appellant because of the authority delegated to him by appellant.

All of this is very smooth and compelling but wholly misleading. The Court did not proceed in any such haphazard manner.¹ It approached its task logically and directly, denying both exoneration and limitation *solely* because for both purposes it imputed the negligence of Captain Patronas to appellant. Appellant's dispute with these findings is that they are predicated upon erroneous legal assumptions.

¹The technique of restructuring the lower court's findings on a piecemeal basis to attempt to develop a coherent theory for affirmance has frequently been rejected by this Court. See *e.g.* *Welsh Co. of California v. Strolce of California, Inc.*, 290 F. 2d 509, 511 (9th Cir. 1961). Cf. *Mladinich v. U.S.*, 371 F. 2d 940, 942 (5th Cir. 1967).

In this case there would be no liability if there were no unseaworthiness. The Court found, in Finding of Fact 4 [Clk. Tr. p. 846], that the CHICKASAW was unseaworthy because of its fathometer.² But a finding of unseaworthiness was not enough to deny either exoneration or limitation;³ it was also necessary in order to deny exoneration for the Court to find a want of due diligence. The Court did so in Finding of Fact 5 which states in full as follows:

“(5) *Want of due diligence*

Captain Patronas failed to exercise due diligence to make the fathometer seaworthy because, with knowledge of the uncertainty with respect to its condition, he took no steps to repair or check it.”

But this too was not enough if limitation was to be denied in addition to the denial of exoneration. Therefore, the Court went on in Finding of Fact 6 to deal with the question of appellant's privity and knowledge. Because of the importance of the interpretation of this Finding of Fact, appellant sets it forth in full:

“(6) *Waterman's privity, fault and knowledge*

It was the WATERMAN STEAMSHIP CORPORATION's obligation to exercise due diligence to make the SS CHICKASAW seaworthy at the commencement of the voyage from the Far East. This included an obligation that the ship's navigational equipment be put in a suitable state of repair before going to sea. WATERMAN STEAMSHIP CORPORATION operated a regularly scheduled service, carrying cargo from all

²Analysis of just what unseaworthiness the Court found will be deferred for discussion to Section IV, *infra*.

³The Government's argument to the contrary will be dealt with in Section IV, *infra*.

the Far East ports for regularly commenced voyages, and it had a general agent in the Far East, EVERETT STEAMSHIP CORPORATION, which performed the function of the owner only as respect to scheduling cargo, arranging stevedoring, tug and other necessary services. WATERMAN STEAMSHIP CORPORATION did not give EVERETT authority to direct repairs. As to repairs, WATERMAN placed all authority, including authority to decide whether repairs should be made at all, with the Master, and had in the Far East no supervisory or managerial personnel to carry out its obligations to exercise due diligence to make the vessel seaworthy. WATERMAN therefore had delegated to the Master its entire managerial responsibility as respects such repairs at the commencement of this voyage and therefore WATERMAN had knowledge, privity, and is at fault for the decision not to repair the fathometer.

“Due diligence was not exercised to make the SS CHICKASAW seaworthy and that the loss of the vessel, the absence of due diligence, the unseaworthiness of the fathometer occurred with the privity, fault and knowledge of the WATERMAN STEAMSHIP CORPORATION.”

It is clear from the Findings of Fact that there was only one ground for denying limitation, not two alternative grounds, and that this ground was dependent upon the negligence of Captain Patronas in failing to take steps to check or repair the fathometer [Finding 5, Clk. Tr. p. 847]. Two further factors confirm this conclusion. The first is the Court's Memorandum Opinion which is important in inter-

preting the findings. That Opinion stated in pertinent part as follows:

“I find, therefore, that the inoperability of the fathometer, or at least the uncertainty as to its proper operation after it had worked erratically was unseaworthiness which in this case had contributed to the grounding. Petitioner is, therefore, barred from exoneration.

“Let us consider now the question of limitation of liability.

“It is conceded that the shipowner has a duty to use due diligence to make the vessel seaworthy at the commencement of its voyage. It appears that the CHICKASAW visited all ports in the Orient subsequent to the date of the entry in the rough log relating to the defective fathometer. We may assume, therefore, that whenever the western voyage commenced, it was in any event after the defect was noted, so that at the commencement of the voyage the WATERMAN STEAMSHIP CORPORATION had the duty to put the fathometer in a seaworthy condition. Petitioner, however, seeks to limit its liability in this area under the provisions of Title 46 U.S.C.A. Section 183, contending that even though there were a lack of diligence in preparing the vessel for its voyage, it occurred without the privity of knowledge of the owner.

“Upon whom in the Orient would the responsibility and authority rest to make necessary repairs and to put the ship in a seaworthy condition before the voyage? The evidence discloses that the EVERETT STEAMSHIP COMPANY was the agent for petitioner in the Orient but only for the purpose of making arrangements and facilitating any work which the company wished

to have done. The authority to initiate the work and the responsibility for having it done rested with the Captain. Evidence failed to disclose any one of high rank in a managerial hierarchy or with greater authority in the Orient than Captain Patronas. In this case, Captain Patronas was also charged with the knowledge of a defectively operated fathometer and did nothing about it.

"I find, therefore, from the evidence adduced that Captain Patronas was negligent in failing to check and repair, if need be, the erratically operating fathometer and that this negligence was indeed the negligence of WATERMAN STEAMSHIP CORPORATION since Captain Patronas was its duly authorized agent to determine the necessity for such repairs and to get them done if need be." [Clk. Tr. p. 762].

Nowhere in the entire discussion of negligence with respect to both exoneration and limitation, all of which is set forth above, is there *any* mention of *any* negligence or fault on the part of any employee or agent of Waterman Steamship Corporation, except that of Captain Patronas. Thus, it is clear that when the Findings of Fact were prepared it was not the Court's intent to find privity and knowledge on some basis other than Captain Patronas' negligence. In view of the Court's opinion, if the Court had intended to find a basis for denying limitation other than imputation of Captain Patronas' negligence, it would have clearly so stated and not left this critical conclusion to be derived from a tortured reconstruction of its findings. Yet, just as the opinion points to no one other than Captain Patronas, so too, the Findings of Fact point

to *no* act or omission on the part of *anyone* associated with Waterman other than the Master upon which a finding of privity or knowledge could be predicated. This absence in findings as comprehensive as those of the lower court in this case is revealing, and particularly so in view of the history of Findings of Fact in this case, the second factor buttressing appellant's interpretation of the findings.

The first set of Findings of Fact lodged in this case was prepared by appellees and lodged with the Court on August 29, 1966 [Clk. Tr. pp. 888-900]. These proposed findings would have had the Court specifically find that some seven pieces of equipment were unseaworthy, the unseaworthiness of six being causally related to the stranding, and that *Waterman* failed to exercise due diligence with respect to each of these pieces of equipment (see proposed Finding of Fact 4, Clk. Tr. p. 891]. In addition, these proposed findings would have had the Court find, in a separately stated finding, that *Waterman* had privity, knowledge and fault, of the lack of due diligence to make seaworthy and the unseaworthiness of the CHICK-ASAW [proposed Finding 11, Clk. Tr. p. 886]. Finally, the proposed findings would have had the Court find specifically that Waterman had privity and knowledge with respect to the unseaworthiness, because of alleged managerial fault in the appointment of Patronas and the directions given him [proposed Finding 14, Clk. Tr. p. 898], instructions not to repair⁴

⁴Appellees throughout their briefs, time after time, lay great stress on the so-called instruction to "Make no Repairs" (private cargo Brief, pp. 17, 51, Government Brief, p. 78). This is
(This footnote is continued on the next page)

[proposed Finding 13, Clk. Tr. p. 898], and failure to supervise and inspect [proposed Finding 16, Clk. Tr. p. 899]. After objection by appellant to the proposed Findings of Fact [Clk. Tr. p. 779], the Court took the matter of Findings of Fact under submission [Clk. Tr. p. 839] and ultimately accepted a second set of Findings of Fact based upon modifications directed by the Court [see Clk. Tr. p. 843]. Yet, it is just what was rejected in these findings that appellees now use as factual justification for what they claim to be the Court's finding of "direct fault" on the part of appellant sufficient to deny exoneration and limitation without regard to the actions of Captain Patronas.

It was in this context that appellant focused in its Opening Brief on the principal legal issue presented by the Court's Findings of Fact, namely, *was the position of Captain Patronas such that his negligence should be imputed to appellant for the purpose of denying limitation of liability?* This review of the findings makes it clear that the arguments of appellees, insofar as they deal with issues other than those raised in appellant's Opening Brief, must stand or fall not on the Findings of Fact, but on the never articulated contention that the trial court's failure to find direct fault on the part of Waterman was clearly erroneous.

We turn now to the argument.

simply a red herring. The lower court did not find that there were any such instructions and rejected a proposed finding that the instructions referred to were a factor in this case [proposed Finding 13, Clk. Tr. p. 898]. The fact is that the language referred to by appellees [Ex. 92] is simply a paraphrase of the law applicable to subsidized steamship operators as set forth at 46 U.S.C.A. Sec. 1176. There is no evidence in the record whatsoever that indicates that this letter was interpreted by the personnel of the CHICKASAW as meaning they should not obtain repairs to malfunctioning navigational equipment in foreign ports. Indeed, as the Court found [Clk. Tr. p. 848], the Master did attempt to have repairs made in Japan to the one piece of equipment he felt needed them, the radar.

II.

ADMISSION OF THE DEPOSITION OF JOHN E. JENSEN WAS ERROR AND WAS PREJUDICIAL TO APPELLANT.

Appellees' argument makes it essential that appellant recount in some detail the circumstances surrounding the admission of the testimony of Captain Slack. His testimony is one of the bases relied upon by appellees for the admissibility of the incomplete deposition. Appellees claim that Slack's testimony was based "in part on abstracts of depositions, including Jensen's deposition furnished by counsel (for appellant)." [Rep. Tr. p. 526]. Inspecting that citation, the Court will note that appellees in their cross-examination led Slack into testimony that he had read abstracts from depositions including that of Mr. Jensen. Subsequently, the Court stated its assumption that Slack had read the deposition of Jensen [Rep. Tr. p. 530]. From page 533 of the Reporter's Transcript, it is clear that what Captain Slack saw was "a commentary which was taken from various information. It didn't actually include the depositions. There were abstracts from the depositions." Counsel for appellant advised the Court that what Slack had seen was a report letter directed to appellant. One of the attorneys for appellees at that point stated that he did not wish to view the letter nor did he ask for it. Thereafter, Slack stated that he had been advised of Captain Patronas' statement that Jensen had advised him that the fathometer was working erratically and that Patronas had told Jensen to make an entry in the log book [Rep. Tr. p. 534]. There is no other indication of information furnished to Slack from statements of Jensen on which Slack's opinion was based. Contrary to appellees' contention, appellant did not "open a field of inquiry that is not com-

petent or relevant to the issues in the case.” Neither did appellant attempt to place in evidence the deposition testimony of Jensen, thereby waiving its right to cross-examination. As elsewhere in their Brief, the cases cited by appellees are simply not germane to this issue.

The facts are that Jensen’s deposition was continued due to his illness. At the time of adjournment, his direct examination had not been completed. When appellees sought to resume, it was learned that Jensen had died. As stated in appellant’s Opening Brief in every case, except one, in which the issue of admissibility of a deposition where no cross-examination had taken place is considered, *the Court in admitting the deposition did so where the objecting party had conducted its examination*. The single exception is *Inland Bonding Company v. Mainland National Bank of Pleasantville*, 3 F.R.D. 438 (N.D. N.J. 1944). It is apparent from a reading of that case that the Court relied heavily upon Professor Wigmore’s *Work on Evidence*. At page 439 of its decision, the Court quotes a portion of that work. We submit that it is applicable here.

“But, where the death or illness prevents cross-examination under such circumstances that *no responsibility* of any sort can be attributed to either the witness or his party, it seems harsh measure to strike out all that has been obtained on the direct examination. Principle requires in strictness nothing less. But the true solution would be to avoid any inflexible rule, and to leave it to the trial judge to admit the direct examination so far as the loss of cross-examination can be shown to him to be not in that instance a material loss.”

The reason why the testimony should not have been admitted is because in this situation the lack of cross-

examination was "a material loss." The deposition contained the only basis found by the trial court of a causal connection between the fathometer and the stranding. The prejudice is further illustrated in light of the fact that the Coast Guard testimony, which had been concluded before the commencement of the deposition, was not damaging to appellant's position. The net effect of the Coast Guard testimony was that at the time Jensen reported the fathometer was working erratically in the Inland Sea, there was only 10 or 15 feet of water under the keel of the CHICKASAW and in Jensen's opinion, a fathometer ordinarily would not work "very good" under those conditions. Coast Guard Exhibit "I" page 228.

Lastly, the relevant portion of *MacDonnell v. Capital Co.*, 130 F. 2d 311, does not deal with weight of the evidence as suggested by appellees but rather with consideration of improper evidence.

"Moreover, as to the questions raised relative to the admission or exclusion of evidence, we point out that the cause was tried to the court without jury, and under the circumstances such questions become relatively unimportant, the rules of evidence relating to admission and exclusion being intended primarily for the purpose of withdrawing from the jury matter which might improperly sway the verdict, and not for the trial judge, who is presumed to act only upon proper evidence."

In our case there is no "proper evidence" in the Jensen deposition as it was entirely inadmissible. Therefore, as the Court acted on this testimony to find a causal connection between the alleged condition of the fathometer and the stranding, the prejudicial effect of the admission is clear and the presumption of propriety is rebutted.

III.

**THE "PENNSYLVANIA RULE" HAS NO
APPLICATION TO THE INSTANT ACTION.**

The so-called Pennsylvania Rule derives from the United States Supreme Court decision in *Pennsylvania v. Troop*, 86 U.S. 148 (1873). In that case a collision in fog occurred between a steamer and a bark. The steamer was clearly at fault for excessive speed in fog. The principal question before the Court was whether the violation of the rules of the road by the bark contributed to the collision. The Court concluded that it did because the violation of a statute by the bark shifted to it the burden of providing that this violation was not a cause of the collision. Thus, the Pennsylvania Rule, in order to enforce compliance with certain kinds of statutes, assists in filling in the causal gap between violations of those statutes and casualties by shifting the burden of proof on causation to the party guilty of the statutory violation. As the Court stated in *The AAKRE*, 122 F. 2d 469 (2nd Cir. 1941):

“Indeed, however the Pennsylvania Rule was originally stated, the history of its application shows that it has done no more than shift the burden of proof with respect to causality.” (at p. 474).

At the trial court, appellees had the burden of proving, for the purposes of both exoneration and limitation, the causal link between any alleged unseaworthiness and the casualty. When the Pennsylvania Rule is applied, it eliminates the need of proof of causation with respect to statutory violations. Thus, at the trial court, appellees had the burden of establishing, in order to invoke the Pennsylvania Rule:

- (1) Violation of a relevant statute; and

- (2) That the Pennsylvania Rule is applicable to statutes governing navigational equipment and to COGSA cases.⁵

Since the trial court found neither a statutory violation nor that the Pennsylvania Rule was applicable in this case, appellees' burden on this issue on appeal is at least as great, if not greater, than it was in the trial court. They have not sustained it.

Appellees contend two pieces of equipment on board the CHICKASAW violated relevant statutes and regulations; thus assisting them in filling the causal gap between the alleged unseaworthiness and the stranding. The two pieces of equipment in question are the radio direction finder (hereinafter R.D.F.) and the fathometer.

With respect to the R.D.F., the relevant question is did Waterman violate the regulations published at 47 C.F.R. Section 8.517(a)(4) and (b). Section (a)(4) provides that a ship's R.D.F. has to be accurately calibrated for the purpose of taking bearings from which true bearings can be determined for actual use in maritime radio navigation service. And §(b) requires that a record of the calibration of any checks of the accuracy of the R.D.F. be maintained on board the ship for at least one year. These are the requirements for obtaining the F.C.C. certificate, which certificate was granted to the CHICKASAW in November of 1961 [Rep. Tr. p. 961]. The granting of the certificate raised a presumption that the requirements were in fact

⁵This latter point, on this appeal, is relevant only to the claim by the Government that even if the Court holds the testimony of Jensen improperly admitted, which appellant claims it should, the Pennsylvania Rule establishes causation between the uncertainty with respect to the condition of the fathometer and the loss without need for Jensen's testimony. See Government's answering Brief, p. 45.

met at that time. *The PRINCESS SOPHIA*, 61 F. 2d 339 (9th Cir. 1932).⁶ No evidence has been offered to overcome this presumption, and the testimony of Mr. Hall and Mr. Kroh (the F.C.C. examiner and the R.C.A. technician, respectively) establishes that there was compliance [Rep. Tr. pp. 961 and 982].⁷

The relevant regulation pertaining to the fathometer, 46 C.F.R. Section 96.27-1, requires that vessels such as the CHICKASAW be fitted with an efficient elec-

⁶Appellees contend the due diligence required by COGSA, and the lack of privity or knowledge required by the Limitation Statute, is not due diligence in obtaining certificates and imply that the certificates obtained by the CHICKASAW shortly before the voyage in question were of no relevance, even with respect to statutory fault. See Government's answering Brief at p. 87. It should be noted that certification, when dealing with the question of statutory fault, stands on a different footing than certification as relates to due diligence to make a vessel seaworthy. With respect to determining whether or not due diligence has been exercised to make the vessel seaworthy, certification by the relevant authorities is evidence of what was done, to be considered in deciding the question of due diligence; with respect to a claim of statutory violation, however, the fact that equipment had been certified as not in violation of the statutes in question obviously raises a presumption of compliance with the statutes that must be overcome by the party claiming a statutory violation.

⁷In addition, appellees have confused the distinction brought out at trial by the testimony of Captain Slack [Rep. Tr. p. 613], between "calibration" and "check bearings." The requirement that the R.D.F. be accurately calibrated for the purpose of taking bearings from which true bearings can be obtained does not relate to the use of check bearings but rather to having the equipment calibrated, that is, the built-in adjustment made in the equipment. The testimony of the F.C.C. inspector [Rep. Tr. p. 944] showed that calibration within 5° of the true bearings is acceptable to the F.C.C., and that the R.D.F. on board the CHICKASAW was calibrated within those limits. The same confusion enters into appellees' interpretation of sub-paragraph (b) of the rule. This sub-paragraph does not require keeping on board of a record of the check bearings but rather a record of the calibration of any check bearings. That is, the compensation in the machine for check bearings exceeding the permissible limits. That record, of the 1952 calibration, was on board the CHICKASAW [Ex. 35].

tronic deep-sea sounding apparatus. The Coast Guard is charged with enforcing this regulation. At the time of the annual inspection of the CHICKSAW in November of 1961, the CHICKASAW was found in compliance with this regulation. As with the R.D.F., this raises a presumption of statutory compliance. With respect to the fathometer, appellees therefore have the burden not only of showing the CHICKASAW's fathometer to have been inoperable (see footnote 9, *infra*) but of showing that this violated the regulation. This requires appellees to show that the regulations equate "efficient" with "operable" so that any vessel whose fathometer becomes inoperable is automatically in violation of the regulations and is subject to the penalties provided. In view of the nature of navigational equipment, this is a doubtful proposition and appellees introduced no evidence to support it.

The burden facing a party wishing to show a statutory violation of a certification statute in the face of certification is particularly heavy. Appellees have not carried that burden.

The second requirement faced by appellees in applying the Pennsylvania Rule in this action is a showing that it is applicable to both navigational equipment statutes and to COGSA cases. They have done neither.

The vast majority of cases in which the Pennsylvania Rule has been applied involved collisions where a violation of one of the navigational rules of the road has been shown.⁸ In such cases the negligent navigation of the vessel is imputed to the owners and, because there is a dependent relationship between the vessels involved, a violation of a rule of the road is clearly negli-

⁸Indeed, one prominent authority, Griffin, in *Griffin on Collision*, Section 254 at page 579, argues persuasively that the Pennsylvania Rule should apply only to collision cases involving violation of navigational rules of the road.

gent navigation. Application of the Rule in these cases, therefore, acts to inhibit future violations. The other category of cases in which the Rule has been applied consists of cases such as *The DENALI*, 105 F. 2d 413 (9th Cir. 1939), where there is a violation of a statute relating to subjects such as the manning of vessels on owner's instructions. Here, too, the application of the Pennsylvania Rule will inhibit future willful violations. In cases such as the instant one, however, where the violation claimed is failure of the equipment to fulfill the statutes in the interim period between certifications, the application of the Pennsylvania Rule will not act to inhibit future violations. Appellees' position apparently is that the failure of equipment to meet the statutory standards, after certification, is a statutory fault. If this interpretation of the statute were to be accepted, the application of the Pennsylvania Rule would affect the outcome only of the case under consideration, it would not prevent the equipment from malfunctioning. Machines are indifferent to the rules of law. It is thus not surprising that attempts to expand the Pennsylvania Rule into this area have generally been unsuccessful. *The IOWA*, 34 F. Supp. 843 (D.C. Ore. 1940). Indeed, appellant has found no case applying the Rule to cases of navigational equipment malfunction, and appellees have cited none.

The Pennsylvania Rule has not been applied in cases involving claims for exoneration under COGSA. Thus, it is no assistance to appellees in establishing a causal relationship between the fathometer and the stranding if, as appellant contends it should, this Court rejects the testimony of Jensen as inadmissible. The rea-

son is clearly because COGSA, unlike the law applicable to collision and limitation cases, contains its own internal allocation of burden of proof, an allocation quite different from that created from the Pennsylvania Rule. Under COGSA a causal relation between alleged unseaworthiness and the casualty must be shown by claimants. The function of insuring statutory compliance by owners, fulfilled in collision and limitation cases by application of the Pennsylvania Rule, is fulfilled under COGSA, by shifting the burden of proof of due diligence to make the vessel seaworthy to owners. Thus, the rationale for applying the Pennsylvania Rule does not exist in COGSA cases. It is, of course, true that some cases, and again *The DENALI*, *supra*, is an example, have purported to apply the Pennsylvania Rule to Harter Act cases (46 U.S.C.A. Section 190, *et seq.*) but in those cases its application is superfluous because causation is irrelevant. If due diligence to make the vessel seaworthy has not been exercised by owners, exoneration is denied under the Harter Act regardless of cause. *The ISIS*, 290 U.S. 333 (1933). Indeed, the elimination of the built-in Pennsylvania Rule in the Harter Act is one of the major distinctions between that Act and COGSA. Under COGSA it is required that cargo interests (appellees herein) prove causal unseaworthiness.

Two additional points with respect to appellees' attempt to utilize the Pennsylvania Rule in conjunction with the R.D.F. deserve mention. First, the Pennsylvania Rule establishes causality when applicable. It does not establish privity or knowledge. As is well illustrated by *The DENALI*, *supra*, it is still necessary

that the statutory violation be within the privity or knowledge of management level personnel of the shipowner. Assuming, therefore, that there was a statutory violation with respect to the R.D.F., which appellant denies, what was the participation in this violation by management personnel of appellant? There is no finding of any such participation, and appellees in their briefs fail to mention it. The evidence, however, clearly demonstrates that the relevant managerial personnel of appellant had no privity or knowledge of any such statutory violation. Specifically, the evidence shows that they had instructed the masters of their vessels to comply with the statutory requirements with respect to the R.D.F. [Ex. 59], that they arranged for specialized technical assistance insuring that the equipment did so comply [Rep. Tr. p. 982], and that prior to the vessel's departure from Mobile in the Fall of 1961, the F.C.C. passed the equipment as meeting the statutory requirements [Rep. Tr. p. 961]. Under these circumstances, there can be no privity or knowledge of management personnel of any alleged statutory violation of the R.D.F.

Second, even assuming, contrary to what appellant has demonstrated, that there was a statutory violation and that management personnel of appellant had privity or knowledge of that violation, all that the Pennsylvania Rule does in the final analysis is to shift the burden of proof with respect to causality to appellant. *The AAKRE, supra*. The trial court in this case found that appellant sustained that burden [See Finding 8, Clk. Tr. p. 849].

To sum up, the Pennsylvania Rule is inapplicable to cases of navigational equipment malfunction and to *COGSA* cases, and even if it were not, no statutory violation was found by the trial court.

IV.

**APPELLANT IS ENTITLED AS A MATTER OF LAW
TO EXONERATION FOR CARGO LOADED PRIOR
TO DECEMBER 25, 1961.**

The initial burden when a shipowner attempts to establish its right to exoneration for cargo loss under COGSA is on the shipowner to show that the loss was caused, at least in part, by one of the excepted causes enumerated in COGSA (Section 1304(2)(a-p)). If the shipowner succeeds in carrying this burden (as appellant did here [see Finding 11, Clk. Tr. p. 859]), then it is incumbent upon cargo interests to show that the loss was also in part caused by unseaworthiness [this the lower court found appellees did, see Finding 4, Clk. Tr. p. 846].⁹

⁹Appellant submits that appellees make a second error in interpretation of the Court's Findings of Fact when they contend that Finding of Fact 4 holds the CHICKASAW unseaworthy on two alternative grounds; first, that the fathometer was defective, and second, that the vessel was unseaworthy due to the lack of knowledge of the vessel personnel relating to the condition of the fathometer after it had been reported inoperative. While this misinterpretation is not as critical as that which leads appellees to contend that the trial court found "direct fault" of Waterman, it is relevant to the discussion of exoneration. Appellees create the impression that the fathometer itself was found to be defective by first quoting that portion of Finding 4 which states the CHICKASAW was unseaworthy because the fathometer was not in reliable working condition and then connecting that portion of the Finding with the portion dealing with the condition of the fathometer after the stranding, as though that were the reason the Court found the fathometer to be unreliable, ignoring entirely the reason the Court gave for its finding that the fathometer was unreliable (private-cargo brief, pp. 24 and 25). This illusion is furthered by their quotation of the so-called "even if" finding as though it were a separately stated paragraph when in fact it is not and is but a part of the over-all explanation the Court gives with respect to unseaworthiness [Contrast private cargo brief, at p. 26, with the last paragraph of Finding of Fact 4, Clk. Tr. p. 847]. When read in its entirety and in context, it seems clear that the Court gives the reason that it found the

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If cargo interests succeed in establishing causal unseaworthiness, the shipowner still may be exonerated if it shows, in the words of the statute:

“. . . due diligence on the part of the carrier to make the ship seaworthy . . .” (46 U.S.C.A. Sec. 1304(1)).

See *Firestone Synthetic Fibers Co. v. M/S HERON*, 324 F. 2d 835 (2nd Cir. 1963). For the purposes of

fathometer “was not in a reliable working condition,” in the sentences immediately following in the same paragraph when it said: “On Monday, December 25, 1961, Jensen, the 3rd Mate of the SS CHICKASAW, started the fathometer, which he found was then inoperative, which condition he reported to the Master. The Master directed him to log that condition, which he did. No repairs were thereafter made to the fathometer and the fathometer was not thereafter determined to be in a satisfactory operating condition.”

The so-called “even if” finding is simply an elaboration of the reason previously given by the Court for its finding that the CHICKASAW was unseaworthy, that is, the unreliable condition of the fathometer, an unreliable condition created by the Master’s failure to check it after his receipt of a report that it was inoperative. The portion of the finding relied upon by appellees relating to the state of repair of the fathometer is in the same sentence with, and is a reply to, appellant’s contention at the trial court that it should be exonerated because after the stranding the fathometer operated properly [Rep. Tr. p. 759] and relates to the condition of the fathometer some two weeks after the stranding during which period the vessel had been buffeted by heavy seas [Rep. Tr. p. 1323]. That the trial court was in doubt as to the actual condition of the fathometer immediately prior to the stranding, an issue upon which cargo interests had the burden of proof, see *Firestone Synthetic Fibers Co. v. M/S HERON*, 324 F. 2d 835 (2nd Cir. 1963), and chose to rest its determination of unseaworthiness on the uncertainty with respect to the fathometer’s condition is illustrated by the following quotation from the Court’s Memorandum Opinion:

“The evidence is not clear whether the instrument was actually in a good working condition at the time of the grounding or not . . . Had the fathometer been turned on immediately prior to the grounding, it might well have functioned properly. But since it had been found by Jensen to be defective on one occasion and had not since been repaired or checked, the uncertainty as to whether it was operable constituted unseaworthiness for which the shipowner was responsible.” [Clk. Tr. p. 761].

this showing each port at which cargo is loaded is the commencement of a new voyage for cargo loaded at that port. 46 U.S.C.A. Sec. 1303(1), *Mississippi Shipping Co. v. Zander & Co.*, 270 F. 2d 345 (5th Cir. 1959).

Appellant's position with respect to exoneration for cargo loaded prior to December 25, 1961, therefore, is simple. Regardless of when the unseaworthiness found by the Court originated (see footnote 9, *supra*), the only failure of due diligence found was that of Captain Patronas in failing to check the fathometer after Jensen's report of December 25, 1961, that it was not operating properly [Finding 5, Clk. Tr. p. 847, see also section I, *supra*]. Thus, there was no failure to exercise due diligence to make the vessel seaworthy at or prior to the commencement of the voyage with respect to that cargo loaded prior to December 25, 1961, and appellant having established negligent navigation as a cause of the loss, is entitled to exoneration under COGSA as to that cargo.

We turn now to the attacks upon appellant's argument contained in appellees' briefs. First, appellees contend that:

"It would make no difference in the situation of common carriage of cargo under bills of lading . . . that the unseaworthiness originated after the cargo was loaded aboard."¹⁰ Government's answering Brief, pp. 94 and 95.

¹⁰In this portion of their Brief, the Government also makes reference to the rule of *The VALESCURA*, 293 U.S. 296 (1934). It is unclear to appellant what the Government's argument based on this rule is, but it should be noted that that rule deals with the burden of allocation when a loss is caused in part by an excepted cause and in part by a non-excepted cause. In this action, with respect to the cargo loaded prior to December

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This argument ignores the clear statement in Section 1303(1) that the carrier's obligation to use due diligence with respect to unseaworthiness is limited to the period of time at and prior to the commencement of the voyage with respect to that cargo. An extensive analysis of this point is found in *Mississippi Shipping Co. v. Zander, supra*. In that case, the failure to exercise due diligence to make the vessel seaworthy occurred at a port subsequent to the port of loading of the cargo in question because of a failure by the Master to inspect and repair an unseaworthy condition of which he had knowledge. In this regard, the case is quite close to that in the instant action. The contention there was made that exoneration should be denied because of the failure to exercise due diligence subsequent to the beginning of the voyage. The Court rejected this contention, stating:

“At Santos, and at Montevideo and Buenos Aires, the Master stood as any other servant of the shipowner and any failure to exercise due diligence to make the vessel seaworthy with respect to cargo loaded at each respective port would be chargeable to the owner. But at subsequent ports and with respect to cargo previously loaded, the acts of the Master (and crew members) are those of management and navigation excusable under Section 4 unless, as is not the case here, the particular activities are those concerning the care, custody, receipt and delivery of cargo . . .” (Citations omitted) (at p. 350).

25, 1961, which can be easily identified by the bills of lading, the concurring causes of the loss were both excepted causes, i.e.: Negligent navigation and unseaworthiness not resulting from want of due diligence at or prior to the commencement of the voyage. The rule of the *VALESCURA* thus has no application.

Second, appellees contend that exoneration must be denied as to the cargo loaded prior to December 25, 1961, because of the "direct fault" of appellant. In large part this argument has been dealt with previously (see I, *supra*, and see footnote 9, *supra*) there was no finding of direct fault or indeed any finding of fault, or want of due diligence, or negligence, other than that of Captain Patronas after December 25, 1961, as found in Finding of Fact 5. Indeed, the lower Court rejected a proposed finding that appellant failed to exercise due diligence because of a failure to inspect [contrast Clk. Tr. p. 899 with Clk. Tr. p. 847] which is the very factual basis upon which appellees claim that the so-called finding of direct fault should be sustained (see private cargo brief, p. 25, and Government's Brief, p. 78). Under these circumstances then appellees have the heavy burden of convincing this Court that the trial court's rejection of the so-called direct fault was clearly erroneous and that this Court should substitute its judgment on the evidence for that of the trial court. This they have not done or even attempted to do. For indeed the evidence supporting the trial court's rejection of appellees' contention is substantial. Briefly, the record shows:

(1) That the reasonably prudent shipowner does not periodically inspect the electronic components of the fathometer [Rep. Tr. p. 488, Captain Slack, Mr. Haldane, p. 1328, Captain Khune, p. 1083] nor would it be good practice to do so [Rep. Tr. p. 487];

(2) That when the CHICKASAW was in drydock immediately prior to departure from Mobile for Japan, the non-electronic components of the fathometer were inspected [Rep. Tr. p. 1245];

(3) At the time of the vessel's drydocking in Mobile, inquiry was made by shoreside personnel of the vessel's

navigating officers as to the functioning of the fathometer and it was reported to be in good condition [Rep. Tr. p. 1242]; and

(4) The fathometer operated properly on the trip in question prior to Jensen's report [Rep. Tr. p. 333] and even immediately after the stranding [Rep. Tr. p. 759].

What is left, therefore, is appellees' third contention, namely, that as a matter of law appellant's failure to periodically disassemble and inspect the electronic components of the fathometer constitutes a lack of due diligence. In support of this position, appellees rely principally upon three cases (private cargo brief, p. 27); *Ionion Steamship Co. of Athens v. United Distillers*, 236 F. 2d 78 (5th Cir. 1956); *Ore Steamship Corporation v. D/SA/S Hassell*, 137 F. 2d 326 (2nd Cir. 1943); and *Standard Oil Company v. Angelo-Mexican Petroleum Corporation*, 112 F. Supp. 630 (S.D. N.Y. 1953). What these cases hold, however, is not that a shipowner in order to be entitled to exoneration under COGSA must conduct detailed inspections, but rather that where the circumstances are such that a reasonable shipowner would make an inspection, it is want of due diligence to fail to do so. This, of course, is nothing more than the normal test of due diligence, *i.e.*, what would be done by a reasonably competent shipowner. *National Sugar Refining Co. v. M/S LAS VILLAS*, 225 F. Supp. 686 (E.D. L.A. 1964). The language of the Court of Appeals in the *Ionion* case is indeed appropriate:

"(W)here the standard of due diligence is applicable, it comprehends inspection and investigation, *where prudent*, to determine the existence of deficiencies before they become critical, and the failure to discover defects which examination would necessarily have disclosed is the very absence of due diligence." (236 F. 2d at 84). (Emphasis added).

Private cargo simply emphasizes the wrong portion of the quotation (private cargo brief at p. 27), for it clearly indicates that inspection and investigation is called for "where prudent." This language is even more meaningful in light of the facts in the *Ionion* case. In *Ionion*, the ship in question stranded twice in September of 1951, as a result of a defect in the steering gear. In August of 1951, the vessel had been through a severe hurricane in which it sustained substantial damage, after which the beginning of steering difficulties were noted in the log. Despite this, when the general hurricane damage was repaired, no inspection or repair was undertaken of the steering mechanism. Of course, when a vessel, has been through a severe storm suffering damage and the owner is put on notice of the possibility of damage to the steering mechanism, it is "prudent" when the damage from the storm is repaired to investigate the steering mechanism. This does not mean, however, that any inspection any ingenious cargo claimant can dream up is required in order for a shipowner to obtain exoneration under COGSA, and specifically it does not mean that a shipowner is under any obligation to disassemble a fathometer for inspection when it has no report of any malfunction. The other two cases are the same; in neither is there anything that even suggests that the trial court in this case as a matter of law should have found that appellant lacked due diligence to make seaworthy because it did not periodically disassemble the electronic components of the navigational equipment.

V.

**LIMITATION OF LIABILITY SHOULD HAVE BEEN
GRANTED AS A MATTER OF LAW.**

A. Introduction.

The gist of appellant's argument, considered in some detail in its Opening Brief (pp. 21-46), may be quite briefly summarized:

The trial court denied exoneration to appellant because of unseaworthiness it found occurred through Captain Patronas' lack of due diligence. Thus, the only question remaining was: Was Captain Patronas' want of due diligence within the privity or knowledge of managerial personnel of appellant? The trial court found that it was because Captain Patronas had been delegated the "managerial responsibility" of ascertaining the condition of navigational equipment in foreign ports and obtaining their repair if necessary. This conclusion in turn is based upon the erroneous legal assumption, unsupported by either the policy of the Limitation Act or the consistent trend of cases interpreting it, that the non-delegable managerial responsibility to exercise due diligence to make a vessel seaworthy in each port in which it loads cargo under COGSA is also a non-delegable managerial responsibility for the purposes of the Limitation of Liability Act. There is no question but that Captain Patronas was delegated the task of ascertaining the condition of navigational equipment in foreign ports and arranging for necessary repairs. The error is in the legal assumption that this is a "managerial responsibility" for the purposes of limitation of liability and that therefore negligence in performing it is sufficient to deny limitation (See Appellant's Op. Br. pp. 44-46).

Appellees have declined to directly respond to this analysis; specifically, they do not contend that owners non-delegable duty to exercise due diligence at each port in which cargo is loaded for the purposes of COGSA serves a similar function under the Limitation Act. Instead, they have mounted a multifaceted attack upon appellant's position based in part upon what has already been demonstrated to be their erroneous assumption that there was a finding of so-called "direct fault" on the part of WATERMAN, and in part upon the voluminous citation of cases, for the most part without analysis of the facts of those cases, purportedly imposing various absolute obligations upon owners in limitation of liability cases. In order to properly respond to these arguments, it is necessary to analyze with some care the policy basis of the Limitation Act as it is presently interpreted.

B. The Policy of the Limitation Act.

We start with the proposition that originally the Limitation of Liability Act, and its non-statutory predecessors in other maritime nations, had as its purpose limiting the liability of the owner to that which he put at risk when the ship departed from his control and in particular insulating the owner from the negligent acts of the master, members of the crew, and other agents (See Appellant's Op. Br. pp. 22-38). This concept was, and is, relatively easy to apply to the case of an individual owner of a vessel. Absent personal participation in the fault causing the loss, the individual owner is insulated from liability by delegation of authority to competent agents, including the master and crew members.¹¹

¹¹One area of some doubt remains ever in the case of the individual owner. That is the situation in which the individual owner delegates all authority with respect to the management

(This footnote is continued on the next page)

The analysis with respect to corporate owners, however, is not so simple. One possible interpretation would be that since corporate owners always act through agents, a corporate owner always has privity or knowledge of the negligence of any of its employees and thus is never entitled to limitation. This quite obviously would vitiate the limitation statute completely with respect to corporate owners and has been uniformly rejected. See *e.g. Coryell v. Phipps*, 317 U.S. 406 (1943). Equally unacceptable is the opposite extreme, namely, that a corporation does not have privity or knowledge unless it takes official corporate action that is negligent, as for example by a resolution of the Board of Directors. This approach also has been rejected. See *Coryell v. Phipps*, *supra*. It soon became accepted, therefore, that a corporation would be denied limitation if the privity or knowledge or fault were that of managerial or supervisory personnel with authority over the phase of business out of which the loss occurred. *Craig v. Continental Insurance Co.*, 141 U.S. 638 (1891). Even this test, however, does not satisfactorily solve the prob-

of the vessel to an agent, which agent in turn negligently carries out some of these duties. The cases are unclear as to whether or not in such circumstances the individual owner is insulated from liability by the delegation. See the analysis of this point in *Admiral Towing Co. v. Woolen*, 290 F. 2d 641 (9th Cir. 1961). Appellees contend that the *Admiral Towing* case stands for the proposition that limitation is available only against the "instantaneous negligence" of the Master and members of the crew. (See private cargo brief, p. 47, government's answering brief, p. 31.) There is no policy justification for such distinction. As will be demonstrated the appropriate policy determinant is the degree of effective control which can be exercised. Thus, it is true that in general instantaneous negligence of the Master and crew members does come within that area in which effective control cannot be exercised. This does not mean, however, that there are not other such areas. Indeed, to the extent that this point is discussed at all in *Admiral Towing*, it clearly indicates that shoreside duties can be delegated and limitation granted (See 290 F. 2d at p. 647).

lem because on varying facts there may be a wide disparity between who fills this particular definition and, without more, it could put a premium on intentional ignorance. Thus, the limitation cases dealing with corporations have through the years evolved the doctrine of "Effective Control."

The development of this doctrine was foreshadowed by cases such as *In re Sanford Ross*, 204 Fed. 248 (2nd Cir. 1913), and *The ARGENT*, 1940 A.M.C. 508 (S.D. N.Y. 1915). In both of these cases the vessels concerned were barges traveling over short distances and the defects causing the loss against which limitation was sought were obvious defects of long standing. Thus, in both of them the ground of decision appears to be that the vessels were within the effective control of the owners. Limitation, therefore, was denied because of the negligence of an employee of relatively low status. But it was clearly pointed out in *The ARGENT*, *supra*, that:

"The philosophy of ship owner's limitation seems to me this: There are so many things which ship owners must do by deputy, and must have done at great distances and under circumstances where human fallibility is particularly prone to produce error, that they have long been saved by statute from the consequences of their agent's acts."

The doctrine was brought to fruition as the ground of decision in the Supreme Court case of *Spencer-Kellogg Co. v. Hicks*, 285 U.S. 502 (1932). In that case a launch which was used to carry the petitioner's employees to work over a distance of about a mile and a third was known to be unsafe to utilize when there was ice on the river. An employee of managerial status, Stover, was in charge of the operation and had given the master appropriate instructions not to utilize the

vessel under these conditions. The master nonetheless did so, the vessel ran into ice, and sank with heavy loss of life. Limitation was sought on the theory that the delegation to the master of the duty not to sail when there was ice on the river insulated the owners from liability. The Court found to the contrary relying heavily on the opportunity available to Stover to exercise effective control since with very little effort he could have ascertained for himself whether or not there was ice on the river and taken steps to see that the master obeyed the rules. The situation was specifically contrasted with the situation when a vessel was great distances from the managerial authority in the corporation where such control could not be exercised. In those situations the owner :

“must rely upon the master’s obeying the rules and using reasonable judgment.” (At page 511).

However, under the circumstances of that case, Stover was required to use “reasonable diligence” to exercise effective control and because of his failure to do so limitation was denied.

It should be noted that the duty is not that of absolute control, even in the home port, but that it is a practical doctrine of using reasonable diligence to exercise effective control under the circumstances of the situation. This, of course, is quite similar to the standard of due diligence under COGSA (see section IV, *supra*). There is, however, a key distinction; under COGSA a failure to exercise due diligence at or prior to the commencement of the voyage by *any* employee is sufficient to deny exoneration whereas under the Limitation Act that failure must be brought home to someone of *managerial* or *supervisory* status.¹² The basis of this dis-

¹²This distinction was in part overlooked by Gilmore & Black in *The Law of Admiralty* in their oft-quoted language (at p. 696), discussing the relationship between COGSA and limita-

inction as was demonstrated in Appellant's Opening Brief, pages 21-45, is the difference in background between COGSA and the Limitation of Liability Act that led to COGSA's enumerating certain specific areas beyond the effective control of owners for which entire exoneration will be permitted while leaving to the Limitation Act the remaining areas beyond owner's effective control where exoneration will be denied but limitation granted.

tion. The single case cited by Gilmore & Black in support of the proposition that the standard of care imposed on the owner by the Limitation Act is the same as that imposed by COGSA does not support that proposition. This case is *Accinato, Ltd. v. Cosmopolitan Shipping Co.*, 99 F. Supp. 261 (D. Md. 1951), reversed in part 199 F. 2d 134 (4th Cir. 1952). In that case the shipowner, a sub-time charterer, raised in defense both the Fire Statute (46 U.S.C.A. Sec. 182) and the fire exception of COGSA, Section 1304(2)(b). The trial court noted that the former was not available to the charterer because it was not a charterer who manned and victualled its own vessel. However, it noted that this was of no great importance because these two sections were substantially equivalent. It should be noted, however, that the specific section of COGSA in question is the only section of COGSA which incorporates some of the language from the limitation statute, namely, "privity or knowledge" and thus, since the fire statute language "design or neglect" had for some considerable time been considered to be equivalent to the limitation statute "privity or knowledge" it is, of course, reasonable to equate the fire exemption of COGSA with the fire statute. The reason for the equivalence, however, is not that the limitations statutes now require the higher duty of COGSA, but that the specific exemption of COGSA concerned requires only the lower standard of the limitation statutes. This fact is demonstrated by the opinion of the Court of Appeals in which exoneration under the COGSA fire exemption is permitted on the authority of *Earle & Stoddard v. Ellerman's Wilson Line*, 287 U.S. 420 (1932) because in the *Accinato* case the lack of due diligence, if any, was that of someone to whom the duties concerned had been properly delegated. Under the normal COGSA standard this would offer no protection but under COGSA fire exemption it did. This case should be contrasted with *Moore-McCormack Lines, Inc. v. Armco Steel Corp.*, 272 F. 2d 873 (2nd Cir. 1959), which is a recent case which does "restate" the lower standard of duty imposed by the Limitation Act. It also should be noted that Gilmore & Black somewhat inconsistently do make the appropriate distinction in a later section. See Section 10-22 at page 698.

Several propositions follow from the doctrine of effective control which are of assistance in analyzing appellees' argument.

First, owners must conduct or arrange for competent periodic inspections, particularly of the vessel's hull, *where prudent*. This is the explanation of such cases as *The CALVERT*, 51 F. 2d 494 (4th Cir. 1931); *In re Petition of Henry DuBois' & Sons Co.*, 189 F. Supp. 400 (S.D. N.Y. 1960); *Dexter-Carpenter Co. v. New York, O. & W. Ry. Co.*, 50 F. 2d 270 (S.D. N.Y. 1931); *The MIAMI*, 43 F. 2d 562 (S.D. N.Y. 1930); and *Hansen v. Fidelity and Columbia Trust Co.*, 68 F. 2d 144 (6th Cir. 1933).¹³

In each of these cases the vessel in question was a barge or lighter operating in close proximity to the owner's shoreside organization and easily within their effective control. In addition, each of them involved old vessels with deteriorating hulls, not subject to either Coast Guard or Classification Society periodic inspections where the owners, although easily able to do so, did not replace this type of inspection with any inspection of their own. Particularly appropriate is the lan-

¹³A similar case is *Republic of France v. French Overseas Corp. (The MALCOLM BAXTER, JR.)*, 277 U.S. 329 (1928). In that case the owners had just purchased the vessel, *without a warranty of seaworthiness*, and thus had an affirmative duty to determine its condition prior to using it. For their failure to do so they were denied limitation. However, as the Court of Appeals in *Earle & Stoddard v. Ellerman's Wilson Line*, 54 F. 2d 913 (1931), *aff'd*, 287 U.S. 420 (1932), pointed out, immediately preceding the language quoted by private cargo (at p. 48), had this failure "been only that of the vessel's master, the benefits of the Harter Act would have been lost, but not the benefits of the Limitation of Liability Act." Private cargo tries to use this case, as discussed in the *Earle & Stoddard* case, to distinguish that case from the instant one, completely ignoring the Supreme Court's ruling in *Earle & Stoddard* that there is *no* non-delegable duty to use due diligence to make seaworthy for the purpose of the limitation statute.

guage of the Court in *In re Petition of Henry DuBois' & Sons Co.*, *supra*, at page 403:

"The derrick was not a seagoing vessel. Its dredging operations were confined to the New York Harbor. Except when actually dredging or in tow, it really never went beyond the immediate control and direction of the shoreside executive and managerial employees of petitioner. It was regularly available for inspection by Roselino as well as other managerial employees and executives of petitioner.

"Petitioner had no system or regulation for regular inspection or drydocking, although it owned and operated about 30 vessels. No routine inspection had ever been made of the TRENTON. Thus it closed its eyes to what would have been obvious and readily revealed upon proper and periodic inspection."

These cases should be contrasted with *The CITY OF BANGOR*, 13 F. Supp. 648 (D. Mass. 1936). In this case the petitioner bought the vessel and had it reconditioned in 1929. Then as a result of the depression it was not put into service. Instead, in 1931, it was moved to the docks of the Federal Wharf Company and placed in the care of Captain Ingersoll who had previously been in the service of the company as a master and whose sole duties were to care for this vessel and other vessels while they were tied to the dock. The vessel sank damaging the pier. One of the conditions contributing to the sinking was that caulking had come out of some of the seams above the water line. The Court in granting limitation said:

"The managing agents of the vessel were in New York. They had the vessel's hull repaired at the time they purchased her in 1929. They then put her in the hands of a competent master whose duty

it was to report to them if at any time the vessel became unseaworthy. There was nothing to show that Captain Ingersoll ever made any such report.”

It seems obvious that these cases dealing with old rotten barges never venturing far from the immediate range of supervision of managerial personnel, have little relevance to the instant action. In particular, they do not stand for the proposition that there is an absolute duty to discover whatever any inspection, without regard for the circumstances, might disclose. Yet this is what is at the root of appellees’ contentions relating to inspection (see private cargo brief, pp. 28-34 and Government’s answering Brief, pp. 78-86).

Second, owners, through their managerial level personnel, must inspect, inquire, and instruct if they have a duty to act arising from some knowledge that there probably is a defect making the vessel unseaworthy. The language most often quoted in this context is that from *The CLEVECO*, 154 F. 2d 605 (6th Cir. 1946), at page 613, as follows:

“ . . . Knowledge means not only personal cognizance but also the means of knowledge—*which the owner or his superintendent is bound to avail himself*—of contemplated loss or condition likely to produce or contribute to loss, unless appropriate means are adopted to prevent it.” (Emphasis added).

This language, however, was in the context of the case in which, as a result of a restriction on a certificate issued by the Coast Guard, the owner was “definitely on warning that the ADMIRAL was a dangerous vessel to be handled with the utmost care.” (at p. 613).

Other similar cases include *Tug Carrier Mack-Barge 204*, 194 F. Supp. 383 (S.D. Ala. 1961); *Ruth Conway Tug Hustler*, 75 F. Supp. 574 (D. Md. 1947); *CITY*

OF BRUNSWICK, 6 F. Supp. 597 (D.C. Mass. 1934); *MIDLAND VICTORY*, 178 F. 2d 243 (2nd Cir. 1949); *THE VESTRIS*, 60 F. 2d 273 (S.D. N.Y. 1932); *Great Atlantic and Pacific Tea Corp. v. Brasilero*, 159 F. 2d 661 (2nd Cir. 1947); *The SILVER PALM*, 94 F. 2d 776 (9th Cir. 1937); and *States SS Co. v. United States (The PENNSYLVANIA)*, 259 F. 2d 458 (9th Cir. 1958). In each of these cases managerial level personnel of the owners had knowledge that should have led a reasonable manager to suspect an unseaworthy condition and thereby gave rise to an affirmative duty to act. This point was perhaps best stated in *States SS Co. v. United States, supra (The PENNSYLVANIA)*, at page 472, where this Court said:

“Mere non-action on the part of managing agents in allowing their subordinates to prepare a ship for departure will not serve to excuse the owner from any portion of his responsibility *if the knowledge of the managing agent is such that they ought to inquire and inspect.*” (Emphasis added).

This statement was made in the context of a case in which the marine superintendent, Vallet, knew of evidence of crack sensitivity of vessels of the class to which the *PENNSYLVANIA* belonged, knew that the possibility of cracks and sensitiveness was increased when a vessel had a history of prior cracks as did the *PENNSYLVANIA*, and knew that the danger was the greatest when the vessel went through cold and stormy waters, where the normal route for a vessel in the *PENNSYLVANIA*'s trade would take her. Under these circumstances the Court held that Vallet, who was of managerial status, had a duty to act and ascertain whether or not the vessel was crack sensitive, or at the minimum to instruct the master not to take the

vessel through those waters which would increase the danger.

It is upon cases such as these that appellees rely to support their position that owners' duties with respect to maintenance and repair of navigational equipment are not delegable: "That the owner has the knowledge of whoever he puts in charge of repairs . . ." (private cargo brief, p. 41).¹⁴

The preceding analysis, however, makes it clear that these cases do not support that proposition; nothing in any of them offers comfort for appellees in their contention that whomsoever the owner puts in charge of repairs is of managerial status. What they do stand for is the proposition that the managerial personnel have a higher, affirmative duty when those personnel are possessed of knowledge sufficient to give warning of probable unseaworthiness. A good illustration once again is *States SS v. The United States, supra* (*The PENNSYLVANIA*). In that case privity and knowledge of owners was not found because Vallet was in charge of maintenance and repair of all vessels, as contended by appellees (private cargo brief, p. 41), but because Vallet, the marine superintendent, was concededly of managerial status and had an affirmative duty to act. This Court, in its two opinions on rehearing in the *States SS Co.* case, made it abundantly clear that if no managerial level employees of the shipowner had an affirmative duty to act, and had the only failure

¹⁴Appellees persist in asserting that they do not contend that the duty to arrange repairs for navigational equipment is under all circumstances non-delegable; instead they say that "owner is privy to the knowledge of the person who is in charge of maintenance and repairs." (private cargo brief, p. 43). Appellant can see no distinction between saying that the duty is non-delegable and saying that it is delegable but the owner is responsible for whatever is done by the person to whom the duty is delegated. In any event, this semantic quibble makes no difference to the substantive rule.

of due diligence been that of a non-supervisory agent, the lower court's granting of limitation would have been affirmed. The Court said:

"Before there could be a finding or a conclusion such as Finding VII (the District Court's finding of no privity or knowledge) there would have to be a finding based on evidence that the negligence which the court found existed was that of a non-supervisory agent such as a *master* or an operating engineer." (At p. 464) (Emphasis added).

and:

"The reason there is no basis for the limitation here is that the only persons whose negligence could have operated to bring about the unseaworthy condition, the only persons to whom the lack of due diligence could possibly be charged, were persons who were managing officers of the corporation. The court not only did not find that the failure to exercise due diligence was that of minor or subordinate employees, but the court could not have made such a finding."

and:

". . . and it also discloses that this lack of due diligence necessarily attached to the petitioner and not to any subordinate employees of petitioner." (p. 470).

and, finally:

"The next question is: Whose lack of due diligence sent a ship thus unseaworthy to sea? The only conclusion that anyone would be entitled to draw from the evidence in this record was that Vallet was the one man so chargeable. This is not a case where it could be speculated that Vallett was off on vacation or not on duty when the failure to 'use the due diligence required by law to make the vessel seaworthy,' took place." (p. 473).

This reading of this Court's opinion in the *States Steamship* is confirmed in *Port of Pasco v. Pacific Inland Nav. Co., Inc.*, 324 F. 2d 593 (9th Cir. 1963), in which this Court said:

"In the *States SS Co.* case, the District Court found that the loss of the ship was caused by its unseaworthy condition, and that the latter condition resulted from lack of due diligence. The District Court, nevertheless, felt that the unseaworthy condition of the vessel at the inception of the voyage was without the privity or knowledge of the owner and that liability could therefore be limited. In reversing on rehearing, the court felt that in view of the finding that the loss was caused by unseaworthiness resulting from lack of due diligence it could not be held that the loss was occasioned without the privity or knowledge of the owner *unless there was a finding that the negligence which the court found existing was that of a non-supervisory agent.*" (Emphasis added) (at p. 599).

In the instant action the trial court did not find that the lack of due diligence was that of managerial or supervisory personnel. It expressly found that it was a failure on the part of the master to take action, after notice to him, while the vessel was enroute between two foreign ports, of a possible defect in navigational equipment. In this case, therefore, we have what was lacking in the *States SS Co.* case; an express finding that the want of due diligence was that of non-managerial, non-supervisory personnel.

The third proposition that may be derived from the doctrine of effective control is that the degree of the control possible varies with the distance of the vessel from managerial personnel. The requirement of the

duty to exercise control varies accordingly. Delegation of duties will obviously be of less protection to an owner where a substantial shoreside organization with persons of managerial status exists because of their capability not only of delegating duties but also of close supervision of the work undertaken. The corollary proposition, of course, is that the further the vessel is from owner's shoreside organization and managerial personnel, the greater the amount of responsibility which can be delegated to non-managerial personnel without leading to a denial of limitation when the duties are performed negligently. This point is made clear by a contrast of *In re Petition of Henry DuBois' & Sons Co.*, 189 F. Supp. 400 (S.D. N.Y. 1960), in which limitation was denied, stressing the close proximity of the vessel at all times to the control of managerial personnel, with *Moore McCormack Lines, Inc. v. Armco Steel Corp.*, 272 F. 2d 873 (2nd Cir. 1959), in which limitation was granted when the failure of due diligence occurred at a foreign port distant from managerial personnel, with particular stress laid upon that distance.¹⁵ It is not the function

¹⁵Private cargo contends (at p. 51 of their brief) that the *Moore-McCormack* case "is another of the cases which consistently recognizes that the owner *cannot* limit where he provides defective equipment at the start of a trip," thus apparently drawing a distinction (nowhere explained) between defective stowage and defective equipment. This is not correct. In *Moore-McCormack* the trial court found that the Assistant Marine Superintendent (who was conceded to be of managerial status) had *personally* incorrectly calibrated the stabilogauge, which factor contributed to the loss. There is, of course, no question but that negligence of managerial personnel themselves is sufficient to deny limitation if causally related to the loss. This does not mean, however, that non-negligent provision of an improperly calibrated stabilogauge would have led to a denial of limitation. The Court of Appeals, in any event, was able to disregard the allegedly improperly calibrated stabilogauge because evidence it allowed introduced proved the error of the lower court's finding of negligence. The important point in the *Moore-McCormack* case does not involve the stabilogauge at all: it is the Court's holding that an owner will not be denied limitation for leaving to vessel personnel in foreign ports that which, as a practical necessity, must be left to them.

which determines whether or not delegation is proper but rather the degree of effective control that managerial personnel can exercise at the time of the negligent act. If the reasonably prudent shipowner could, under the circumstances of the case, do no more than delegate the particular function to a presumably competent non-managerial employee, then effective control has been exercised and limitation will not be denied because of the negligence of the delegate. *Cf. Albina Engine & Mach. Works v. Hershey Chocolate Corp.*, 295 F. 2d 619 (9th Cir. 1961).

Appellees' authorities are not to the contrary. None of them even remotely resemble the situation in the instant action because in each the negligence either occurred while the vessel was within the easy control of managerial level personnel who negligently failed to exercise that control in a proper manner (see *e.g. Austerberry v. United States*, 169 F. 2d 583 (6th Cir. (1948))), or was the result of the failure of managerial level personnel with knowledge of probable unseaworthiness to take appropriate steps (see *e.g. The CLEVECO*, *supra*).

C. Conclusion.

The lower court's denial of limitation in this case can only be justified if a *shipowner has a non-delegable responsibility* prior to leaving every port to insure that all navigational equipment is in proper working order. The lower court found such a duty by carrying forward from COGSA the non-delegable duties arising from that statute. Appellees in this case would have this Court find such a duty in the nature of the function

itself. Neither principle nor authority supports either approach. The whole rationale of the Limitation Act is to insulate the owner from negligence over which he can exercise no meaningful control, which, as has been shown, was precisely the situation in this case.

It is respectfully submitted that for the foregoing reasons the decision of the District Court should be reversed.

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LEO J. VANDER LANS



NO. 21769

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH DISTRICT

JOHN TENOPIR,)
)
Appellant.)
)
-vs-)
)
STATE FARM MUTUAL AUTOMOBILE)
INS. CO.,)
)
Appellee.)
)

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

APPELLANT'S BRIEF

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FILED

SEP 14 1967

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JURISDICTIONAL STATEMENT

This action was commenced by the filing of a complaint in the United States District Court for the District of Alaska, and a final decision dismissing the plaintiff-appellant's, John Anopir's claim against State Farm Mutual Automobile Insurance Company, was rendered on January 10, 1967.

This appeal is taken from said decision pursuant to the provisions of 28 USC 1291, which confers jurisdiction of appeals from all final decisions of the United States District Court in the United States Court of Appeals, and 28 USC 1294 (a) which designates the circuit embracing said district as the proper Court of Appeals to which such appeal shall be directed.

STATEMENT OF THE CASE

At about 11:30 o'clock P.M. on July 26, 1964, appellant John Tenopir was seriously injured in an automobile accident while riding as a passenger in the back seat of his own car. (Complaint, paragraph I and VI). At the time of the accident Tenopir's car was being driven by Howard Golliheair (Complaint, paragraph I) with Tenopir's permission. (Complaint, paragraph IV). Tenopir brought suit against Howard Golliheair and others in the Superior Court for the State of Alaska in an effort to gain recovery for the injuries he received from the accident. (Complaint, paragraph VII).

Tenopir had in effect at the time of the accident an automobile insurance policy with the Appellee, State Farm. (Complaint, paragraph III). Under the policy Tenopir was the named insured and Howard Golliheair was an additional insured. Nevertheless in the State Court suit State Farm refused to defend Golliheair. (Complaint, paragraph IX).

A judgment was entered in favor of Tenopir against Howard Golliheair for \$124,228.60 in the State Court suit. (Complaint, paragraph XI). To satisfy this judgment, Golliheair assigned his rights under the State Farm policy to Tenopir. (Complaint, paragraph XII). Tenopir then brought suit against State Farm and others in the United States District Court for

e District of Alaska alleging in addition to the above, that
e State Farm policy applied in the situation described to insure
Golliheair against the personal injury claim of Tenopir and that
State Farm had an obligation to defend Golliheair against that
claim. (Complaint, paragraph IX).

On October 10, 1966, the appellee, State Farm, filed a
motion to dismiss Tenopir's claim, alleging that said claim
failed to state a cause of action because the policy in question
specifically excluded from coverage any claim of the named insured
for his own bodily injuries. Tenopir opposed the motion, alleging
that the policy exclusion relied upon by State Farm was ambiguous
and that the ambiguity had to be resolved against State Farm and
further argued that the meaning attributed to the exclusion
cause by State Farm was contrary to the public policy of the
State of Alaska.

On January 10, 1967, the United States District Court
entered a decision in favor of State Farm, dismissing Appellant
Tenopir's claim. This appeal is brought by the Appellant Tenopir
from said decision.

SPECIFICATION OF ERROR

I.

The trial court erred in granting defendant, State Farm Mutual's motion to dismiss plaintiff's complaint against defendant for failure to state claim against the defendant because the insurance contract of State Farm is ambiguous and when resolved against the insurer, the plaintiff-appellant is covered under said contract and states a sufficient cause of action.

II.

The trial court erred in granting State Farm Mutual's motion to dismiss in that the intent of the parties regarding the scope of the insurance coverage is a question of fact to be determined by the finder of fact, in this case a jury.

ARGUMENT

I.

THE TRIAL COURT ERRED IN GRANTING DEFENDANT, STATE FARM MUTUAL'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AGAINST SAID DEFENDANT FOR FAILURE TO STATE A CLAIM AGAINST SAME IN THAT SAID COMPLAINT DID IN FACT STATE A LEGALLY SUFFICIENT CLAIM AGAINST THE DEFENDANT, STATE FARM.

A. When an insurance contract is ambiguous or uncertain in meaning such ambiguity or uncertainty must be resolved adversely to the insurer.

One of the basic rules of construction applicable to insurance contracts is that whenever a policy is ambiguous or susceptible to more than one meaning, the policy must be construed strictly against the insurer and liberally in favor of the insured as to give effect to that construction of the policy which permits recovery by the insured rather than the one which would deny coverage. This rule has been adopted throughout the United States and has been cited with approval by the Supreme Court of Alaska in the cases of Lumberman's Mutual Casualty Co. v. Continental Casualty Co., 387 P.2d 104 (Alaska 1963) and Pepsi-Cola Bottling Co. v. New Hampshire Insurance Co., 407 P.2d 1009 (Alaska 1965).

The rule was also cited with approval by this court in the case of Hess v. National Indemnity Co. of Nebraska, 247 F.Supp.

4, 947 (D.C. Alaska 1965), wherein the court stated:

"It is a well-settled rule of construction that where ambiguity or uncertainty exists in an insurance contract, such ambiguity or uncertainty will be resolved adversely to the insurer."

Therefore, the principal issue to be decided by this court is whether the insurance clause in question is susceptible to any meaning other than that propounded by the defendant, State Farm.

B. The term "the insured" as used in the policy of insurance issued by the appellee State Farm Mutual to the appellant, John Tenopir is ambiguous in meaning.

- (1) The phrase's ambiguity is reflected in the terms of the policy itself.

The insurance policy at issue in this case was attached to plaintiff's complaint as Exhibit "B" in the court below. On page three of that policy under the definition section applicable to the insuring agreement sought to be enforced by the appellant is stated:

"INSURED - under coverages a, b, c and m the unqualified word "insured" includes

- (1) the named insured, and
- (2) if the named insured is a person or persons, also includes his or their spouse(s), if a resident of the same household, and
- (3) if residents of the same household, the relatives of the first person named in the declarations, or of his spouse, and

(4) any other person while using the owned automobile provided the operation and the actual use of such automobile are with the permission of the named insured or such spouse and are within the scope of such permission, and
(5) under coverages A and B any person or organization legally responsible for the use of such owned automobile by any insured as defined under the four subsections above."

In other words, five classes of people qualify as an "insured" under insuring agreements I and II of the policy.

Even though more than one person or class of persons are insureds under said policy the omnibus and exclusion clauses of the policy speak in terms of "the insured". The fact that more than one individual can qualify as an insured under the policy raises the question as to whether the phrase "the insured" as used in said clauses is singular or plural in meaning. Who then is "the insured" under the facts of this case?

At the time of the accident, Howard Golliheair was driving the insured automobile (Complaint, paragraph I). While Mr. Golliheair did not own the insured automobile, he was driving it with the permission of the named insured (Complaint, paragraph II). Thus, Howard Golliheair qualifies as an additional insured under part (4) of the above quoted provision of State Farm's policy.

As an insured, Howard Golliheair was entitled to have
ate Farm pay on his behalf

"all sums which the insured shall
become legally obligated to pay as
damages because of (a) bodily
injury sustained by other persons . . ."
(emphasis added) (page 2 of
insurance policy part (1) coverage
(A) and (B)).

According to the judgment entered in the case John
Tenopir v. Howard W. Golliheair (Exhibit "C" of the Complaint)
Howard Golliheair was legally obligated to pay John Tenopir
23,228.60 for injuries he sustained as a result of Howard
Golliheair's negligence. Nevertheless, State Farm has refused
pay any part of said judgment. State Farm's refusal is based
on the belief that an additional insured under the policy in
question is not insured against injuries he or she may negligently
inflict upon the named insured, John Tenopir.

As support of its position, State Farm relies upon
exclusion (i) contained on page 4 of said policy which states that
the insurance policy does not apply to

"bodily injury to the insured or any
member of the family of the insured . . ."
(emphasis added).

State Farm contended in the trial court below (page 3
State Farm's memorandum in support of its motion to dismiss)
that the words "the insured" in the above exclusion refer to the

med insured as well as the additional insureds. In order to
cept State Farm's contention one must conclude that the phrase
he insured" is plural rather than singular in meaning. Such a
nclusion is contrary to the accepted usage of the word "the"
nce according to Webster's Dictionary

" 'the' (as opposed to 'a') is used
to refer to a particular person . . .
(such as) that (one) which is present,
close, nearby, etc. as distinguished
from all others, which are considered
remote . . ."

State Farm apparently believes that the definition of
nsured" stated on page three of its policy sufficiently alerts
e insured to State Farm's alleged departure from accepted usage
the word. However, appellant does not see how the definition
sists in determining the difference in meaning between the
rases "the insured", "the named insured" and "an insured". The
efinition merely states

"INSURED . . . the unqualified word
'insured' includes
(1) the named insured, and
(2) if the named insured is a person
or persons, also includes his or their
spouse(s), if a resident of the same
household, and
(3) if residents of the same household,
the relatives of the first person named
in the declarations, or of his spouse,
and
(4) any other person while using the
owned automobile provided the operation
and the actual use of such automobile
are with the permission of the named

insured or such spouse and are within the scope of such permission, and

(5) under coverages A and B any person or organization legally responsible for the use of such owned automobile by any insured as defined under the four subsections above."

It is appellant's contention that when the word "insured" preceded by the word "the", the word "insured" is no longer unqualified". This is especially true when, as in the case at bar, the word "insured" is frequently preceded by the words "any" "each" and "the named" at various places throughout the policy.

In view of the above, appellant believes that if State Farm really intended to exclude from coverage all bodily injuries inflicted upon any insured by any other insured, it could and should have been more explicit by using wording similar to that contained in the following insurance policies:

"This policy does not apply under Part I: . . . (12) to the liability of any insured for bodily injury to (a) any member of the same household of such insured except a servant or (b) the named insured. (As in State Farm's policy, Farmer's Insurance Exchange states in its definition of insured that "The unqualified word 'insured' includes . . ." Farmers Insurance Exchange Automobile Policy as of January, 1966, and

"This policy does not cover, as respects named insured and/or any additional insured, any liability whatsoever . . . (3) For bodily injuries or death sustained by Named Insured or any other person claiming to be an insured hereunder." The policy of Pennsylvania Indemnity Corp. as found in Hepburn v. Pennsylvania Indemnity Corp., 109 F.2d 833, 834 (C.A. D.C. 1939).

(It should be noted that the definition of the word "insured" in both of the above quoted policies is identical to that contained in the State Farm policy at bar.)

Instead, State Farm chose to use the phrase "the insured" despite the fact that the phrases "the insured" and "an insured" cannot possibly have identical meanings in their proper context. It, as noted in Webster's Dictionary

"The chief grammatical function of 'an' is to contrast with 'the'"

If State Farm had consistently used the phrase "the insured" throughout the policy wherever one might have expected to find the phrase "an insured" or "the named insured", there might be some validity to its contention that the phrase was intended to be synonymous with such phrases. However, no such usage can be found in the policy. Instead, State Farm has frequently used all three phrases throughout the policy. In fact, a careful reading of the policy discloses that the phrase "the

med insured" was used approximately 52 times; that the phrase
n insured" was used approximately 36 times; that the phrase
ach insured" was used approximately three times; and that the
rds "any insured" were also used approximately three times.

For example, the phrase "an insured" was used in the
clusion on page five of State Farm's policy wherein it is stated:

"insuring Agreement III does not
apply:

(a) to bodily injury to an
insured, or care or loss of
services recoverable by an
insured, with respect to which such
insured . . ." (emphasis added)

e same phrase was also used in exclusion (f) on page four of
e policy wherein it is stated that the insurance policy does
t apply:

"under coverages A and B, to bodily
injury or property damage with respect
to which an insured under this policy
is also an insured under a Nuclear
Energy Liability Underwriters of
Nuclear Insurance Association of Canada
or would be an insured under any such
policy but for its termination upon
exhaustion of its limit of liability."
(emphasis added)

Obviously there is no consistency in the phraseology
the policy. If State Farm was able to modify the word "insured"
th words such as "an". "any", "each", in approximately 42 places
ere it wanted to convey the idea that a given statement applied

all five classes of insureds, how can it reasonably contend that its use of the word "the" was also meant to convey the same meaning? Such a contention on their part seems even more indefensible in view of the fact that the phrase "the insured" was also used in the policy in a singular context. The following are a few examples:

"(2) As respects the insurance afforded under coverages A and B and in addition to the applicable limits of liability to pay:

(a) costs taxed against the insured in any such suit and, after entry of judgment, all interest accruing on the entire amount thereof until the company has paid or tendered such part of such judgment as does not exceed the limit of the company's liability thereon; (emphasis added.)

(b) premiums on bonds to release attachments not in excess of the applicable limit of liability, premiums on required appeal bonds, and the cost of bail bonds required of the insured because of accident or traffic law violation, not to exceed \$250 per bail bond, but without any obligation to apply for or furnish any such bonds; (emphasis added)

(c) expense incurred by the insured for immediate medical and surgical relief to others as shall be imperative at the time of the accident; (emphasis added)

(d) reasonable expense incurred by the insured at the company's request, including loss of wages or salary not to exceed \$25.00 per day, if such loss is incurred because of the insured's attendance at trial of any civil lawsuit in defense against allegation of bodily injury." State Farm Mutual Automobile Insurance Company policy, page 2.

"11. NOTICE OF CLAIM OR SUIT - COVERAGES A and B. The insured shall immediately forward to the company to the company every demand, notice, summons or other process received by him or his representative." (emphasis added). State Farm Mutual Automobile Insurance Company policy, page 4.

"2. ACTION AGAINST COMPANY. No action shall lie against the company. . . .(b) Under coverages A, B and division 1 of W-1 and W-2, until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company...." State Farm Mutual Automobile Insurance Company policy, Page 9.

"1. NOTICE OF ACCIDENT, OCCURRENCE or LOSS. In the event of an accident, occurrence or loss, written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place...." (emphasis added) State Farm Mutual Insurance Company policy, page 9.

Appellant believes that the above noted use of the words "he", "an" and "the named" before the word "insured" in State Farm's policy indicates that different insureds are being referred by each different phrase. "The named insured" obviously refers to the policy holder. "An insured" necessarily encompasses all we classed of insureds including the named insured. Therefore, "the insured" apparently must designate the particular insured seeking protection under the policy.

Appellant believes the above distinction is reasonable and that it attributes a reasonable definition to each phrase.

As indicated by the cases cited on page 16 of this

ief, it is not necessary for one to conclude that the definition "the insured" propounded by appellant is the only way of interpreting the phrase; nor is it necessary for one to conclude that the definition propounded by State Farm is completely without merit. As long as more than one interpretation can reasonably be given the phrase it must be interpreted in the manner most favorable to the insured.

(2) The phrase's ambiguity is evidenced by the division of authorities as to its meaning.

In the court below State Farm cited cases from nine jurisdictions in support of its contention that the phrase "the insured" does not refer solely to the insured seeking protection under the policy. It went on to contend on page (1) of its Reply Memorandum and again on page (4) of oral argument transcript that there exists no contrary authority to the holding in those cases. As is indicated below, such a contention is completely inaccurate.

One very recent case directly on point is Farmers Insurance Exchange v. Frederick, 53 Cal. Rptr. 457 (1966). In that case the owner of a pickup truck was injured while riding therein as a passenger. His policy of insurance excluded from coverage "bodily injury to the insured or any member of the family of the insured residing in the same household as the

insured." (emphasis added). The policy also defined the qualified word "insured" as including ". . . the named insured and his relatives, (b) with respect to the described automobile, by other person . . . provided the actual use of the automobile by the named insured or with his permission," The California court held that the quoted exclusion

"does not prevent the named insured from a recovery for bodily injuries suffered as a consequence of negligent operation when someone other than the named insured is properly driving his vehicle." (Supra at 459)

so holding it declared that the phrase "the insured" referred to the person who actually drives the car whether such driver be the named insured or some other who drives with the permission of the named insured. Its reasons were stated thusly:

"It is clear, we think, without any ambiguity that when Frederick (the policyholder) purchased the policy, and when Farmers issued and sold it to him that both parties contracted not only that it would insure Frederick against public liability, but that it would in addition insure anyone who drove the vehicle with Frederick's permission. Frederick therefore is not suing himself. He is suing Edwards, a third person, for whom he also contracted and for whose liability Farmers agreed to become responsible." (Supra at 459)

"In our opinion, if Farmers, by the exclusion meant to include within its operative effect injuries to the named insured even though some other

insured was driving, the language of the exclusion must be such as to leave no doubt that the definition of "insured" is not merely for contractual convenience, but that the named insured can never recover under the policy, or can recover only in certain situations, irrespective of who drives. The exclusion at bench is not that certain." (Supra at 461)

Many other cases exist in which courts have held that the phrase "the insured" as used in insurance policies such as that at bar refers merely to the person seeking protection under the policy rather than to all persons who qualify as insureds thereunder. These cases include:

North River Ins. Co. v. Connecticut Fire Ins. Co., 233 F.Supp. 31 (D.C. Va. 1964) aff'd 341 F.2d 913 (4th Cir. 1965); Arm Bureau Mut. Auto. Ins. Co. v. Smoot, 95 F.Supp. 600 (D.C. Va. 1950); Pleasant Valley Lima Bean Growers & Warehouse Ass. v. El-Farms Ins. Co., 298 P.2d 109 (Calif.); Pullen v. Employers' Liability Assur. Corp., 89 So.2d 373 (La. 1956) reversing 72 So.2d 3 (La.App. 1954); Minneapolis, St. Paul & Sault Ste. Marie R. Co. v. St. Paul Mercury-Indemnity Co., 129 N.W.2d 777 (Minn. 1964); Maryland Cas. Co. v. New Jersey Mfrs. Cas. Ins. Co., 137 A.2d 77 (N.J. Super 1958) affirmed 145 A.2d 15; Greaves v. Public Service Mut. Ins. Co., 155 N.E.2d 390 (N.Y. 1959); Employers' Liability Assur. Corp. v. Liberty Mut. Ins. Co., 167 N.E.2d 142

Ohio 1959); Cimarron Ins. Co. v. Travelers Ins. Co. 355 P.2d 2 (Or. 1960); Ginder v. Harleysville Mut. Casualty Co., 49 Supp. 745 (D.C. Pa.) aff'd 135 F.2d 215 (3rd Cir. 1943); New General Casualty Co., 133 F.Supp. 955 (D.C. Tenn. 1955).

In each of the above cases the term "insured" was defined in the same manner as it is in the case at bar.

State Farm contended in the court below (page 2 reply memo) that the above quoted cases are inapplicable to the issue at bar since they involve an exclusion which pertains only to certain employees of the insured rather than to the insured himself and members of his household. Appellant believes that such a contention is without merit. In each case an exclusion existed in the insurance policy which stated coverage would not be provided for "bodily injury to any employee of the insured . . ." In each case the person injured was an employee of "an" insured but was never an employee of the particular insured for whose protection the policy was being invoked.

It is apparent therefore that in each case the court was required to determine the same issue with which this court is confronted; i.e. to whom does the phrase "the insured" refer? In arriving at their decision as to whom is meant by the phrase "the insured" the above courts made the following typical comments:

"Can it be said that it is clear and unambiguous that an employee of 'the insured', as used in the policy, was intended to mean an employee of 'any insured'? If this was intended, why was the policy not so worded, thus clearly expressing an intent to exclude the liability to the employee of any insured regardless of which insured was presently seeking protection under the policy?" North River Ins. Co. v. Connecticut Fire Ins. Co., 233 F.Supp. 31, 38 (D.C. Va. 1964)

"The exclusion clause uses the term 'employee of the insured' not 'all insureds' which means that it is directed to the situation of some particular insured. The term could apply to 'the insured named in the policy', 'the person qualifying as an additional insured' or 'the insured calling for protection'. When more than one person is included within the singular term, 'the insured', an ambiguity results." (emphasis added) New v. General Casualty Co. of America, 133 F.Supp. 955, 958 (D.C. M.D. Tenn. 1955)

"Policy in question employs in many places the term 'the insured' and 'the named insured'. An occasional clause or paragraph uses both terms. Evidently they are not employed synonymously. Although it is perplexing at times to detect the draftsman's distinction in their meaning, he apparently employed the term 'the named insured' where he wished to designate the policy holder, and the term 'the insured' where he had in mind the additional insured. The facts just mentioned are supplementary factors that indicate that the terms 'the insured' where it appears in the exclusion clause is ambiguous." Cimarron Ins. Co. v. Travelers Ins. Co., 355 P.2d 742, 749 (Or.1960)

In reviewing the various decisions regarding the meaning

of the term "the insured" the Oregon Supreme Court in the Cimarron case also stated:

"It is clear that there is a division in the authorities as to which insured is designated by the term 'the insured'. Appleman, Insurance Law and Practice, Sec. 7404 says: 'The very fact that a number of courts have reached conflicting conclusions as to the interpretation of a contract provision is frequently considered evidence of ambiguity.' American Jurisprudence, Vol. 29, Sec. 260, Insurance, in referring to the rule that ambiguities are resolved against their creator states: '. . . Conversely, the rule does apply where the existence of an ambiguity is shown by the fact that various courts in construing the language in question have arrived at conflicting conclusions as to the correct meaning, intent and effect thereof.' The fact that some courts hold that the words 'the insured' designate the policyholder or named insured while other courts of equally high rank deem that the words allude to the insured who seeks the policy's protection evinces that the words are not free from ambiguity and uncertainty." Supra at 746

Consequently the Oregon court held that the ambiguity must be resolved in favor of the insureds.

Appellant asserts that the "employee" cases cited above are no less applicable to the case at bar than the "family of the insured" cases cited by State Farm in its original memorandum in support of its motion to dismiss. Regardless of whether reference is being made to "an employee" of the insured, "the family" of the insured or "the insured" himself, the phrase "the insured" determines whose family or whose employee is meant.

The relevance of the above cases can be illustrated another way. On page four (4) of the policy at bar, there are 16 exclusions labeled

(a) - (p). The above mentioned "employee" exclusion is contained in exclusion (h) immediately above exclusion (i) which is being debated in the case at bar. Both exclusions contain the phrase "the insured". According to the definition section on page three of the policy "insured" has the same meaning in both exclusion (h) and exclusion (i). Thus, if a jurisdiction has determined that the phrase "the insured" in exclusion (h) refers to the particular insured for whose protection the policy is invoked, it must necessarily follow that the same phrase has the same meaning in exclusion (i). To hold otherwise is completely illogical.

It is not essential for this court to even prefer the interpretation given to the phrase "the insured" by the courts cited above in order to grant appellant's request for a reversal of the lower court's ruling. The court need only find that an ambiguity exists regarding the phrase's meaning. Since so many courts have disagreed with each other over the phrase's meaning, it would appear that an ambiguity obviously exists. To hold that an ambiguity does not exist necessarily means this court believes that the decisions relied upon by appellant are clearly erroneous and that no reasonable mind would ever have rendered such a decision. Surely the courts which rendered said decisions cannot be so blatantly maligned.

(3) The phrase's ambiguity is reflected by State Farm's acts of uncertainty regarding the phrase's meaning.

If the meaning of the "insured" in State Farm's automobile

insurance policy is so clear why didn't State Farm rely on this exclusion when asserting in their letter to Mr. Golliheair of August 24, 1964, that the insurance policy did not provide coverage for the accident? Moreover, why was the point not brought to Mr. Golliheair's attention until December 21, 1964 when after researching the question, counsel for State Farm finally discovered the "true" meaning of the phrase and related this information to Mr. Golliheair in a letter dated December 21, 1964.

If the exclusion's meaning is not even apparent to State Farm's Resident Claims Supervisor upon examination of the policy, or to an attorney without first researching court decisions on the question, how can it be asserted that the ordinary policy holder would know what the exclusion meant?

II.

THE TRIAL COURT ERRED IN GRANTING STATE FARM'S MOTION TO DISMISS IN THAT THE INTENT OF THE PARTIES REGARDING THE SCOPE OF INSURANCE COVERAGE TO BE PROVIDED BY THE INSURANCE POLICY IN QUESTION WAS AT LEAST A QUESTION OF FACT TO BE DETERMINED BY A JURY.

As an alternative ground for reversing the court below, Appellant contends that, if nothing else, the question of intent as reflected in State Farm's policy is a question of fact for the jury to determine.

In Wilmington Trust Co. v. Travelers Ins. Co., 109 F.Supp. 437 (D.C. Del.1952) the court held that under New York law the question of what the insurance coverage was intended by the parties to an insurance contract is a fact question for the jury when the provisions of the contract contain an ambiguity. This same rule was stated as follows in Amstutz v. Prudential Ins. Co. of America, 26 N.E.2d 454, 456 (1940):

"While it is the function of a court to construe a contract, it is the province of the jury to ascertain and determine the intent and meaning of the contracting parties in the use of uncertain or ambiguous language."

Other cases with similar holdings include:

Dale v. Preg, 294 F.2d 434 (9th Cir 1953);

Floyd v. Ring Const. Corporation, 165 F2d 125 (9th Cir 1948); and

Stetson v. Investors Oil, Inc., 140 N.W.2d 349 (N.D.1966).

CONCLUSION

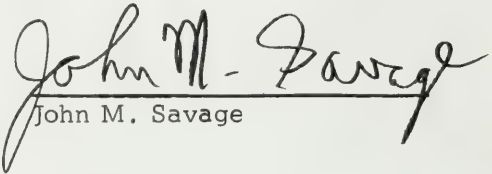
For the foregoing reasons as stated in the arguments in the body of this brief, the United States District Court for the District of Alaska erred in granting State Farm Mutual's motion to dismiss for failure to state a claim, and the judgment should be reversed and the United States District Court for the District of Alaska should be instructed to proceed to hear plaintiff-appellant's cause of action.

STEVENS, SAVAGE, HOLLAND & ERWIN
Attorneys for Appellant

By John M. Savage
John M. Savage

CERTIFICATE

I certify that, in connection with the preparation of this
brief, I have examined revised Rule 18 of the United States Court of
Appeals for the Ninth Circuit, and that, in my opinion, the foregoing
brief is in full compliance with the rules.


John M. Savage

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN TENOPIR,

Appellant,

vs.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE CO.,

Appellee.

No. 21769

Appeal from the United States District Court for
the District of Alaska.

APPELLEE'S BRIEF

BURR, BONEY & PEASE

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FILED

OCT 30 1967

WM. B. LUCK, CLERK

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JURISDICTION

This action was commenced by filing a complaint in the United States District Court for the District of Alaska. The complaint was dismissed for failure to state claim, which order was made final (R. 84) pursuant to Fed. R. Civ. P. 54(b).

The jurisdiction for this appeal is conferred upon the Court of Appeals by 28 U.S.C.A. §1291:

the Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States. . . .

and on the Ninth Circuit Court of Appeals by 28 U.S.C.A. §1294:

Appeals from reviewable decisions of the district and territorial courts shall be taken to the Courts of Appeals as follows:

(1) From a District Court of the United States to the Court of Appeals for the Circuit embracing the district;

. . .

STATEMENT OF THE CASE

The facts out of which this law suit arose are not substantially in conflict. John Tenopir, while a passenger in his own car (R. 1, complaint, paragraph I) was injured (R. 2, complaint, paragraph VI). Howard Golliheair who was the driver of Tenopir's car with Tenopir's permission (R. 1, complaint, paragraphs I & V) was subsequently sued by Tenopir (R. 2, complaint, paragraph VII), and a judgment was entered against Golliheair in favor of Tenopir for \$124,228.60 (R. 2, complaint, paragraph XI). At the time of the accident, Tenopir held a policy of insurance written by defendant, State Farm Mutual Automobile Insurance Company (R. 1, complaint, paragraph III). In that policy Tenopir was the named insured. Consequently, in the suit brought by Tenopir against Golliheair, State Farm refused to defend Golliheair.

Tenopir, as assignee of Golliheair, then sued State Farm in the United States District Court for the District of Alaska, alleging that the State Farm policy applied in the situation described above to insure Golliheair against the personal injury claim of Tenopir and that State Farm had an obligation to defend Golliheair against that claim (R. 2, complaint,

aragraph IX). On January 10, 1967, the United States
istrict Court for the District of Alaska dismissed
enopir's claim for failure to state a cause of action
R. 83). This appeal is brought by appellant Tenopir
rom that decision.

ARGUMENT

THE TRIAL COURT MADE NO ERROR IN GRANTING DEFENDANT STATE FARM MUTUAL'S MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION.

- A. The policy expressly prevents the named insured from seeking coverage for his own bodily injury.

The policy of automobile liability insurance issued to John Tenopir by State Farm specifically excludes from coverage the claim by him because he is the named insured. The basic insuring agreement is as follows (R. 12, Exhibit B, page 2):

Insuring Agreement I - The Owned Automobile.

Coverages A and B - -

(A) Bodily Injury Liability

(B) Property Damage Liability

(1) To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of (A) bodily injury sustained by other persons, and (B) property damage, caused by accident arising out of the ownership, maintenance or use, including loading or unloading, of the owned automobile; and to defend any suit against the insured alleging such bodily injury or property damage and seeking damages which are payable hereunder even if any of the allegations of the suit are groundless, false or fraudulent; but the company may make such investigations, negotiation and settlement of any claim or suit as it deems expedient.

It must be immediately noted that the policy coverage is limited to sums which "the insured shall

become legally obligated to pay because of (A) bodily injury sustained by other persons". "Other persons" clearly means other than the insured. To show that this phrase is clearly applicable to the named insured, the holder of the policy, the policy includes a definitions section (id., p. 3, R. 13):

Definitions - - Insuring Agreements

I and II Insured -- under coverages

A,B,C and M the unqualified

word - insured - includes

(1) the named insured, and

(2) if the named insured is

a person, also includes his

or their spouse (s), if a

resident of the same house-

hold, and

(3) if residents of-the same

household, the relatives of

the first person named in

the declarations, or of

his spouse, and

(4) any other person while

using the owned automobile,

provided the operation and

the actual use of such a

automobile are with the

permission of the named

insured or such spouse and

are within the scope of

such permission, and

(5) under coverages A and

B any person or organization

legally responsible for the

use of such owned automobile

by an insured as defined

under the four subsections

above.

Further, in the exclusions the coverage is explicitly stated not to cover the insured, as defined above, for

is bodily injury (id., p. 4, P. 14):

Exclusions -- Insuring Agreements

I and II

This insurance does not apply under:

* * * *

(i) coverage A, to bodily injury to the insured, or any member of the family of the insured residing in the same household as the insured;

° ° ° °

By express definition John Tenopir, the named insured, the person whose name appears on the policy, is always included within the meaning of the term "insured". The definition of the term "insured" includes five groups; the named insured is first. Each subsequent group is connected to the named insured by "and". This simply means that other persons may fall within the term "insured" depending on the situation of the moment. But regardless of his situation the named insured always is within the term "insured". Therefore, when there is an express exclusion for coverage of bodily injuries to the insured, one need look no further than the face of the policy to find who is automatically meant. That there may be additional persons falling within the term makes no difference. John Tenopir is the named insured; consequently, he is within the definition of "insured", and the insurance does not apply "to bodily injury to the insured". Therefore the policy does not cover his

claims.

- B. The policy is incapable of any other reasonable interpretation and consequent ambiguity.

Nonetheless, appellant contends there is ambiguity in the phraseology of the policy and that since ambiguity must be construed against the insurer, the exclusionary clause should be read differently. The central element of appellant's contention is purely grammatical. The appellant, noting that the exclusionary clause is phrased "the insured", and noting that "the unqualified word "insured" has five definitions, has found ambiguity in a singular insured excluded with multiple insureds defined. To prove "the insured" is singular, appellant relies on several arguments. First he uses the definition of "the" found in Webster, New World Dictionary (1957 World Publishing Company), 1509:

. . . "the" (as opposed to "a") is used to refer to a particular person -- (such as) that (one) which is present, close, nearby, etc. . . .

The stress in the definition, however, is on the particularity and not the singularity. Previously in the definition, the same dictionary stated (ibid.):

. . . the meaning is controlled by the basic notion a previously recognized, noticed, or encountered in distinction to A, AS . . .

"The" is a definite article; hence, it particularizes.

Its definition is more fully explained in Webster, Third New International Dictionary (1966, G & C Merriam Company),

2368:

["The" is] used as a function word to indicate that a following noun or noun equivalent refers to someone or something previously mentioned or clearly understood from the context or the situation. . . .

Used as a "function word", "the" indicates that its following noun is particularized and explained elsewhere. In the policy, "insured", the noun following "the", is explained easily in the section of the policy labeled, "definitions". There we are told what the "insured" is; who is included in the term.

Webster's Third New International Dictionary recognizes many uses of "the" which particularize without singularizing, and in fact, uses which pluralize (ibid.):

. . . used as a function word before a singular noun denoting a human being, an animal, a plant, or a precious stone to indicate that the noun is to be understood generically and not individually [helpful hints for the beginner] [courtesy distinguishes the gentlemen] [the dog was domesticated, in prehistoric times] . . . used as a function word before a noun denoting the body, the mind, or soul, or any part, attribute, or function of any of them, to indicate generic rather than individual application [the mind is clearest

when the body is in good health]
[good for the soul] . . . used
as a function word before a
noun denoting an object (as an
implement, weapon, or musical
instrument) to indicate generic
rather than individual application
[invention of the wheel] [users
of the bow and arrow] [playing
the piano] [the writing is close,
analytic, sharply focused on the
significant detail - William Barrett]
. . .

The adjective "the" does not in any way relate to number. English is not a language in which the adjectives must agree with the nouns they modify in gender, number and case. Rather, its function is only to particularize, to make the reader aware that the noun used is a noun which is special and noted in the context, a particular noun. Here it is a particular insured, an insured particularized as the definitions section defines that term. It is not a single insured although, again looking at the definitions section, it may be, rather it is all those persons who fit that term.

Similarly, appellant's contention that the use of the word "the" qualifies insured and excludes "the insured" from the definitions section for "the unqualified" word "insured" is untenable. "The" specifically makes insured fall within the definition clause by alerting the reader to the fact that its noun

is particularized - defined specially. If the word "the" were to qualify in any fashion it qualifies by referring the reader to the definitions section.

Appellant also contends that State Farm uses the adjective "a" and "the" interchangeably whereas they are opposites. While it is true that "a" is an indefinite article and "the" is a definite article, this is again a distinction which does not go to number. "The" is not used to denote the singular while "a" is used for the plural. Neither word connotes number; neither can be used for that purpose.

- C. Courts when confronted with similar fact situations and similar policies have held the bodily injuries of the named insured excluded from coverage.

Many courts have been confronted with the same factual situations as that presented in this case as applied to substantially identical clauses in insurance policies. The following are but a few:

State Farm Mutual Automobile Insurance Co. v. Cocuzza, 91 N.J. Super. 60, 219 A2d. 190 (1966).

In this case an accident occurred while the owned automobile was being operated by Ryan with the permission of the named insured, Cocuzza. Cocuzza's daughter, who was a passenger in the owned automobile, was injured in the accident. She was a member of Cocuzza's household. Cocuzza sued Ryan for his daughter's injuries. Cocuzza's

insurer, State Farm, refused to defend Ryan and brought a declaratory judgment action seeking an adjudication of non-coverage. The exclusionary clause relied on was identical to clause (i) in the present policy and the other relevant clauses were identical in substance. The court held that the policy did not insure Ryan against the claim brought by the named insured. The court stated:

Exclusionary clauses must be examined and interpreted in the light of their design and intent as well as in view of the objects and purposes of the policy. The purpose of the relevant part of the policy in question was to provide liability coverage. The use of the word "other" in insuring agreement (1) under coverage A makes this clear. The exclusion of the named insured or any member of his family from recovery under clause (g) is in accord with this interpretation. It clearly appears that the parties intended to exclude the named insured and members of his family residing in the same household from recovery on the policy of insurance for any injuries sustained. (Citations omitted)

State Farm v. Cocuzza, supra, 219 A.2d at 193.

Shaw v. State Farm Mutual Insurance Co.,

107 Ga. 8, 129 S.E.2d 85 (1962). There the named insured was a passenger in the owned automobile being driven by a third person, Shaw, with the permission of the named insured. An accident occurred in which the named insured was injured. He sued Shaw. State Farm, the insurer of the named insured,

refused to defend Shaw. Shaw settled and sued State Farm for the settlement amount plus defense costs. The policy in question was identical in substance to the present policy, and the exclusionary clause relied on by State Farm was exactly the same as clause (i) in the present policy. The court held that the policy did not cover Shaw against the claim brought by the named insured. The court pointed out that the clause corresponding to clause (i) in the present policy operated to relieve State Farm of liability. The phrase "the insured" in the exclusionary clause was held to include the named insured. The court noted that the same phrase was also used in the provisions granting coverage (paragraph 1 of the insuring agreement I) and that it must have the same meaning in both places; to say that the phrase, "the insured", did not include the named insured would make the entire contract meaningless. (id. 129 S.E.2d at 87)

Pearson v. Johnson, 215 Minn. 480, 10 N.W. 357 (1943). In this case Mrs. Pearson, wife and member of the household of the named insured, was injured in an accident occurring when she was a passenger in the named insured's automobile which was being driven by Johnson with the consent of the named insured. The named insured and Mrs. Pearson sued Johnson and received

a verdict in their favor. The named insured held a State Farm policy identical in all material respects to the present one. Johnson's insurer was Western. Both insurers' disclaimed liability in a subsequent garnishment proceeding in which Western was found liable and State Farm was exonerated. On appeal the Supreme Court of Minnesota held that the named insured and his wife could not recover on the State Farm policy. The Court stated:

Western premises its argument that it is but secondarily liable upon the contention that Johnson was an "additional" insured under the terms of Pearson's policy with State Farm Mutual and that the provisions in subsection (e) thereof excluding from coverage "the insured or any member of the family of the insured" refer to Johnson and that therefore Ruth Pearson's action against Johnson is not excluded, she not being a member of his (Johnson's) family or household. Certainly the language used in the policy cannot be given such a strained and limited meaning. The word, "insured" is defined by the policy itself to include for the purposes named at all times the named insured, Pearson. That the policy gives it broader application so as to include persons driving with the named insured's consent cannot be said to wipe out the exemptions expressly incorporated into the policy to prevent the insured, that is, the named insured and his family from recovering for their injuries. The policy is essentially a liability and not an accident policy. It is a contract

between Pearson and the State Farm Mutual Automobile Insurance Company by the terms of which the latter agrees to protect the former against liability incurred at the suit of anyone outside [sic] his own family or household. Mrs. Pearson is a member of the named insured's household and family and as such is expressly excluded from coverage. The policy provisions creating additional assureds cannot change the essential contract between Pearson and his insurance company. Certainly they cannot be read so as to nullify the express exclusions of the policy.

id., 10 N.W.2d at 358.

There are many other cases. A partial list from several additional jurisdictions must include: Great American Insurance Company v. State Farm Mutual Automobile Insurance Company, 412 Pa. 538, 194 A.2d 903 (1963); Perkins v. Perkins, 284 S.W.2d 603 (Mo. App., 1955); Hogg v. State Farm Mutual Automobile Insurance Co., 276 Ala. 366, 162 So.2d 462 (1964); Kirk v. State Farm Mutual Automobile Insurance Co., 200 Tenn. 37, 289 S.W. 2d 538 (1956); Kelsay v. State Farm Mutual Automobile Insurance Co., 242 Md. 528, 219 A.2d 830 (1966); Miller v. Madison County Mutual Automobile Insurance Co., 46 Ill. App. 413, 197 N.E.2d 153 (1964).

As the three cases set out in detail above suggest there are several rationale for holding that injury to the named insured is always excluded. For

instance, as in Pearson v. Johnson, supra, many courts have felt that recovery by the named insured would radically alter the basic nature of the policy. Considering that the principal purpose of an automobile liability policy is to protect the legal liability of the named insured, with an extension over to other operators, these courts have felt that a plaintiff's verdict would translate such a liability policy into a personal accident policy for the benefit of the named insured, and have denied him any recovery.

To accord to this policy the effect which the plaintiff claims would be to virtually insert into it another contract, distinct from public liability coverage within the scope of the policy and amounting to personal accident insurance against bodily injuries suffered by the assured. There is nothing to indicate any intention of either party to combine, in this policy, these two kinds of coverage.

Cain v. American Policyholders Ins. Co., 120 Conn. 645, 183 Atl. 403 (1936).

Yet other courts, as in State Farm Mutual Automobile Insurance Co. v. Cocuzza, supra, hold that the coverage clause itself is sufficient to determine the extent of coverage. It is for "bodily injury sustained by other persons", and the exclusionary clause merely reiterates this basic agreement. An exposition

of this rationale is contained in the lengthy analysis of similar language used in a Massachusetts Automobile Liability Statute in MacBey v. Hartford Accident and Indemnity Co., 292 Mass. 105, 197 N.E. 516, 106 A.L.R. 1269 (1935). There the statute read (id., 106 A.L.R. at 1250):

[any automobile liability policy must provide] indemnity for or protection to the insured and any person responsible for the operation of the insured's motor vehicle with his express or implied consent against loss by reason to others for bodily injuries.

The court in construing this language held:

In the present statute, the word "others" describing persons to whom damages are to be paid, following the words "insured" and "any person" joined as describing those to be protected by the policy, plainly shows that inclusions of the named assured within the class of beneficiaries was not within the legislative intent. As a matter of construction, the beneficiaries under the policy are denominated "others" as contrasted with "the insured" and "any person responsible for the operation of the insured's motor vehicle" who may cause the damage. The language of the statute is free from ambiguity.

id., 106 A.L.R. at 1250.

And still other courts have held that any interpretation allowing the named insured to collect for his own injuries would reduce the policy provisions to an absurdity. Shaw v. State Farm Mutual Insurance Co., supra. There the court pointed out that the word "the" was frequently coupled with the word "insured" in the basic insuring agreement. This is true in the present case; State Farm contracts to pay "on behalf of the insured all sums which the insured shall become legally obligated to pay . . ." (emphasis added). Since appellant's suggested construction would negate the basic obligation of the policy, protection of the named insured against claims of others, it necessarily must be rejected. The court in Johnson v. Employer's Liability Assurance Corp., Ltd., 158 Misc. 758, 285 N.Y.S. 574, 106 A.L.R. 1269, modified on appeal 249 App. Div. 906, 292 N.Y.S. 913 (1936) points out the difficulty and confusion that would result under the cooperation condition, when the named insured would be required, theoretically, to cooperate with the insurer at the same time he is a party plaintiff; and when the additional insured would be expected to cooperate, though by doing so, he would defeat his own claim to protection and reimbursement. (Noted in 7 Appleman, Insurance Law and Practice, §4409, note 81).

Similarly, allowing the named insured to collect for his own bodily injuries would limit the exclusion clause to the particular insured seeking the policy's protection which makes that clause meaningless. In relevant part the exclusion states that there is no insurance under "(i) coverage A, to bodily injury to the insured" Under appellant's contention "the insured" as here used can only mean a defendant being sued for personal injuries who is seeking protection of the policy. Of course, the exclusion applies as to "the insured's" own personal injuries. Since it is well established that one cannot sue oneself for one's own injuries it is clear that appellant's construction would under the clause be meaningless. This reasoning has been expressed in Shaw v. State Farm Mutual Insurance Company, supra, 129 S.E.2d at 87:

The contention urged by Michigan would also make the exclusionary clause useless as it would then mean that the insured cannot maintain an action against himself for an injury he negligently caused to his person. This is already the law.

See also Capece v. Allstate Insurance Co., 88 N.J. Super. 535, 212 A.2d 863 (1965).

D. Appellant's authorities are themselves extraneous.

Against these authorities appellant's case law argument refers to a line of cases construing exclusions as to injuries to employees of "the insured" which come within workmen's compensation laws. It would seem that some courts have held the word "insured" in these clauses to mean the person against whom liability is asserted. This view is rejected at least as often as it is accepted. See lists of cases appearing at 50 A.L.R. 2d 97-104, and 5 A.L.R. 2d Later Case Service, 81-82 (1965). But we need not examine the merits of this controversy, for it involves a different exclusion which has distinctly different purposes. This has been judicially recognized. Maryland Casualty Co. v. New Jersey Manufacturers Insurance Co., 48 N.J. Super. 314, 137 A.2d 577, aff'd 28 N.J. 17, 145 A.2d 15 (1958), cited by plaintiff, established the rule in New Jersey that the word "insured" in the so-called "employee" exclusionary clause referred to the person seeking liability protection under the policy. The court in State Farm Mutual Automobile Insurance Co. v. Cocuzza, *supra*, was confronted with a factual situation and exclusionary clause substantially identical to that here. In Cocuzza, the Maryland holding was distinguished on the ground that the basis for the employee exclusion was the

employer-employee relationship between the insured defendant and the injured claimant,

. . . and that the insured defendant must be identified as the employer before he can be subject to exclusion. The Appellate Division said: . . . "Where, as here, an employee of the named insured was not suing the named insured, who had nothing to do with the negligent action which gave rise to the employee claim, but sued an additional insured who was not his employer, the obvious purpose of the exclusionary clause is not implicated."

In the present case there is involved an entirely different exclusionary clause designed for an entirely different purpose.

Cocuzza, supra, 219 A.2d at p. 193.

Appellant cites Farmer's Insurance Exchange v. Frederick, 53 Cal. Rptr. 457 (Cal App. 1966), for a case holding that an exclusionary clause excepting "the insured" meant only the person seeking the policy protection. There Frederick, owner of a pickup truck, was injured while a passenger through the negligence of Edwards who was the permissive driver. While the policy had a similar exclusion clause, "this policy does not apply under Part I: 11, to bodily injury to the insured . . . ", its coverage clause was quite different. The court specifically noted:

. . . that the policy, following section 16451 of the Vehicle Code, contracts to insure against ". . . bodily injury to any person"

id. 53 Cal. Rptr. at 461. Earlier California decisions had already construed this broad coverage clause.

The policy insures for loss arising out of liability of the person operating the automobile to any person or persons Broader language could hardly have been used in the policy.

Budiman v. Independence Indemnity Co., 214 Cal. 529, 6 P.2d 943, (1931), quoted in 7 Appleman, Insurance Law and Practice, §4408, n. 87.

Such broad language is quite different from the coverage granted in the insurance contract between State Farm and appellant Tenopir: "To pay on-behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of (A) bodily injury sustained by other persons. . . ." Further, such broad coverage as used in Frederick is required by statute in California. Cal. Veh. Code, §16451 (Cal. Stats. 1959, Ch. 3). The court in Farmer's Insurance Exchange v. Frederick, supra, was not interpreting an insurance contract; it was interpreting the legislative intent of California Veh. C.A., §16451. In fact, the case, referred to only once since decision, was quoted for that legislative interpretation, Farmer's Insurance Exchange v. Geyer, 55 Cal. Rptr 861 (Cal. App.

1967)). The Alaska Motor Vehicles Safety Responsibility Act, AS 28.20.010 - AS 28.20.640, however, does not require specific wording in any policy issued in this state and does not apply to this policy. Hart v. National Indemnity Company, 422 P.2d 1015 (Alaska 1966).

The determination of the extent California statutes require coverage in California is irrelevant to appellant Tenopir's coverage in Alaska.

Because of the peculiar statute there involved, Farmer's Insurance Exchange v. Frederick, supra, is inapplicable to the present case. It is clear, and all the cases construing the present exclusionary and coverage clauses so hold, that the exclusionary clause is intended to and does operate to prevent the named insured from gaining a recovery for his own injuries on his own liability policy. No other reasonable construction of the policy is possible. Appellant's contentions of ambiguity are grammatically incorrect and legally unsupported. The bodily injury of the named insured is in the policy excluded always and covered never. The policy expressly states it.

II. THE TRIAL COURT DID NOT ERR IN GRANTING
STATE FARM'S MOTION TO DISMISS SINCE THERE
WAS NO QUESTION OF FACT TO BE DETERMINED
BY A JURY.

Appellant's alternative ground for reversal is that the ambiguities of the policy must at least be resolved by the jury as a question of intent. However, appellant refers to no reason, and there is none, why a deviation is needed in this case from the general rule that where the terms of a policy are not ambiguous the intent of the parties is to be ascertained from the instrument itself. 1 Couch, Insurance, 2d, Sec. 15.3 pp. 638-639 (1959).

CONCLUSION

For the foregoing reasons the United States District Court for the District of Alaska did not err in granting defendant State Farm Mutual's motion to dismiss for failure to state a claim, and the judgment should be affirmed.

BURR, BONEY & PHASE

By

Warren W. Matthews, Jr.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


Warren W. Matthews, Jr.

